TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 219.

DELMAR JOCKEY CLUB, PLAINTIFF IN ERROR,

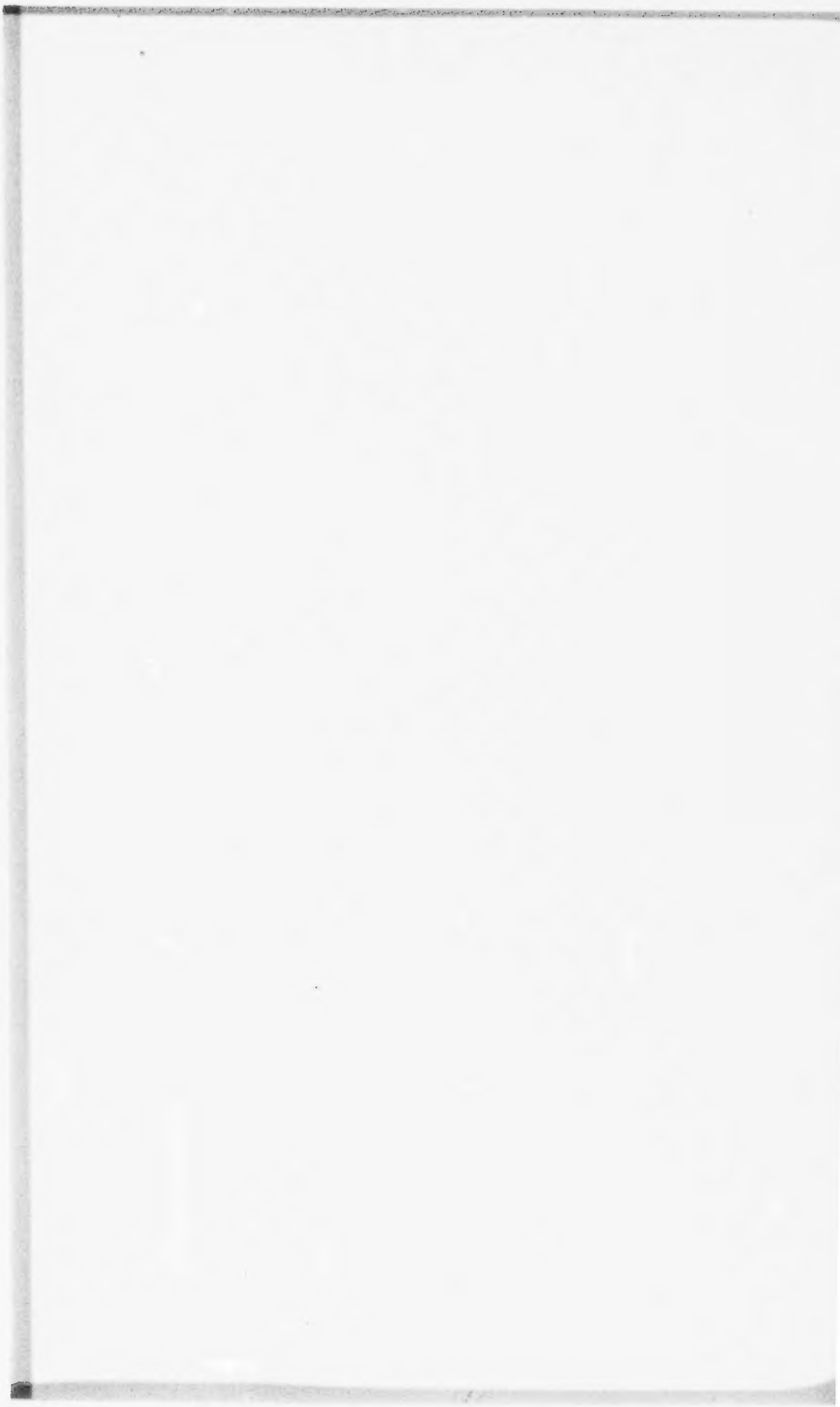
vs.

STATE OF MISSOURI ON THE RELATION OF THE ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED FEBRUARY 1, 1907.

(20,556.)



(20,556.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 219.

DELMAR JOCKEY CLUB, PLAINTIFF IN ERROR,

vs.

STATE OF MISSOURI ON THE RELATION OF THE ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ of error	1½	1
Citation	2	2
Acceptance of service of citation	2½	2
Information	3	2
Order to clerk for issuance of order to show cause	7	6
Order to show cause	8	6
Demurrer filed	13	10
Demurrer	14	10
Motion for judgment on pleadings filed	16	12
Motion for judgment on pleadings	16	12
Submission of cause	17	12
Judgment	17	13
Opinion	17	13
Motion to modify judgment filed	32	23
Motion to modify judgment	33	23
Respondent's answer filed	34	24
Respondent's answer	34	24
Motion to modify judgment overruled	36	26
Motion for judgment on pleadings filed	37	26
Motion for judgment on pleadings	37	26
Motion to strike from files motion for judgment on pleadings filed	38	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 12, 1907.

	Original.	Print.
Motion to strike from files	39	27
Motion to strike from files overruled	42	29
Submission	42	29
Judgment	42	29
Motion for rehearing filed	44	31
Motion for rehearing	44	31
Motion for rehearing sustained	48	33
Judgment on pleadings entered June 1, 1906, set aside	48	33
Judgment	49	34
Opinion	50	35
Motion for rehearing filed	64	44
Motion for rehearing	64	44
Motion for rehearing overruled	68	46
Writ of error, citation, assignment of errors, and bond filed	68	47
Assignment of errors	69	47
Bond	73	50
Certificate of clerk	75	51

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, at the October Term, 1906, thereof, between State of Missouri on the information of the Attorney General, Relator *vs.* Delmar Jockey Club, Respondent, a manifest error hath happened, to the great damage of the said Delmar Jockey Club, Respondent, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if Judgment be therein given, that, then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this Third day of January, in the year of our Lord One Thousand Nine Hundred and Seven.

Issued at office in the City of Jefferson with the seal of the Circuit Court of the United States, for the Western District of Missouri, Central Division, dated as aforesaid.

[Seal of the United States Circuit Court, Central Division, Western District of Missouri.]

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by
JAMES B. GANTT,
Chief Justice.

1½ [Endorsed:] No. —. United States Circuit Court, Western District of Missouri. State *Ex Inf.*, Attorney General, *vs.* Delmar Jockey Club. Writ of error. Filed Jan. 3, 1907. Jno. R. Green, Clerk.

Return to Writ.

UNITED STATES OF AMERICA, *State of Missouri, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified trans-

cript of the record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of Supreme Court of Missouri, at the City of Jefferson, this 9th day of January, A. D. 1907.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

2 The United States of America to State of Missouri, on the relation of the Attorney General, Relator, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Missouri, wherein Delmar Jockey Club, Respondent, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James B. Gantt, Chief Justice of the Supreme Court of Missouri, this third day of January, in the year of our Lord One Thousand Nine Hundred and Seven.

JAMES B. GANTT,
Chief Justice.

2½ [Endorsed:] United States Circuit Court, Western District of Missouri, Central Division. State *Ex Inf.*, Attorney General, *vs.* Delmar Jockey Club. Citation. Filed Jan. 3, 1907. Jno. R. Green, Clerk.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, ss:

I hereby acknowledge due service of the within Citation, this Seventh day of January, A. D. 1907.

HERBERT S. HADLEY,
Attorney for Defendant in Error.

3 No. 13042.

STATE *ex Inf.* ATT'Y GEN.
v.
DELMAR JOCKEY CLUB.

STATE OF MISSOURI, *set:*

Be it remembered, that heretofore to-wit, on the 28th day of July, 1905, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, by Herbert S. Hadley, Attorney General of

the State of Missouri, an information in the nature of *Quo Warranto,* and an order signed by W. C. Marshall, acting Chief Justice of the Supreme Court of Missouri upon the clerk of said court to issue an order directed to the Delmar Jockey Club, to show by what warrant or authority it claims to hold, use and exercise corporate rights, privileges and franchises under the laws of the State of Missouri, and why it should not be ousted from its franchises, corporate privileges and authority to do business in the State of Missouri, and why its property should not be forfeited unto the State.

Which said information is in words and figures as follows, towit:

In the Supreme Court of Missouri. In Vacation.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant.,

vs.

DELMAR JOCKEY CLUB, a Corporation, Respondent.

Comes now Herbert S. Hadley, Attorney General of the State of Missouri, who in this behalf prosecutes for the State, and informs the Court that the Delmar Jockey Club was organized as a corporation under the provisions of Article I and Article IX of Chapter 12 of the Revised Statutes of the State of Missouri for 1899, and the acts amendatory thereof, on or about the 18th day of January,
4 1901; that the capital stock of said corporation, as stated in the articles of association thereof, was One Hundred Thousand Dollars ($100,000.00), divided into one thousand (1000) shares of the par value of One Hundred Dollars ($100.00) each, and the purposes for which said corporation was formed, as alleged in said articles of association, were as follows:

"The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses and other awards and otherwise; to establish and maintain suitable fair grounds and a race track in the City and County of St. Louis, with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track, public exhibitions of agricultural products and stock and of speed, or races between horses, for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto and to said grounds and track; to engage in poolselling, bookmaking and registering bets on exhibition of speed or races at the said race track and premises, as provided by law, and to let the right to others to do the same; to conduct restaurants, cafes, and other stands, for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated.

Your informant further states that since the organization of said Delmar Jockey Club it has become the owner of and is now, and at

all times hereinafter mentioned, was the occupant of and in charge of a certain tract of land, known as the Delmar race track, lying partly in the city of St. Louis and partly in the County of St. Louis, upon which said land there was located a race track, and besides other buildings, erections and improvements, a certain shed or building, known as the betting ring, or shed, for the purpose of having conducted therein pool-selling, book-making, recording and registering of bets upon contests of speed or powers of endurance between certain horses, upon said race track, and of which said shed or building said respondent, through its officers, agents and representatives, is now and at all the times hereinafter mentioned was, the occupant of and in charge of.

Your Informant further states that said Respondent, ever since its organization, has continuously, notoriously and wilfully, within this State and at the county and City of St. Louis aforesaid, offended against and violated the laws of this State, and has grossly perverted, abused and misused its corporate authority, franchises and privileges and has unlawfully assumed and usurped franchises and privileges not granted to it by the laws of the State of Missouri, and especially in the following particulars, towit: That from the 18th day of January, 1901, up to the 16th day of June, 1905, said respondent, through its officers, agents and employees, conducted within the building, known as the betting ring or shed, hereinbefore mentioned, on the Delmar race track, the business of bookmaking and pool-selling, registration of bets and the acceptance of bets, and that during said period, said respondent, acting through its officers, agents and employees in charge of its said business, continuously, notoriously and wilfully violated the laws of this State, in that it sold pools and accepted and registered bets from minors upon the result of contests of speed or power of endurance, known as horse races between horses, run on the track of said respondent. That since said 16th day of June, 1905, the said respondent, acting through the officers, agents, employees and representatives in charge of the business of said respondent, has further continuously, notoriously and wilfully offended against and violated the laws of this State, in this, towit, it has continuously kept and occupied within this State its said shed or building, known as the betting ring or shed, above described, located upon said Delmar race track, with certain books, instruments or devices for the purpose of recording or registering bets and wagers upon the result of trials or contests of speed or power of endurance of horses, which were made and took place upon said race track of said respondent; and it has, through its officers, agents, employees and representatives in charge of the conduct of its business continuously recorded and registered bets and wagers upon the result of trials or contests of speed and power of endurance between certain horses, which were made and took place upon said race track of said respondent; the said respondent, acting through its officers, agents, employees and representatives in charge of its said business, and being the owner, occupant and person in charge of said shed or building, known as the betting ring or shed, as above described, has continuously upon said

Delmar race track knowingly permitted said shed or building to be used and occupied for the purpose of recording and registering bets and wagers upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track. And said respondent, acting through its officers, agents, employees and representatives in charge of the conduct of its said business, has continuously kept, exhibited used and employed in said building, and continuously and knowingly permitted to be kept, exhibited, used and employed in said building, known as the betting ring or shed, upon said Delmar race track, certain devices and apparatus for the purpose of recording bets and wagers upon the result of trials or contests of speed and power of endurance between horses which were made and took place upon said Delmar race track.

Your Informant further states that said respondent has never given any exhibition of agricultural products for the purpose of encouraging and promoting agriculture, or for any other purpose; that is has never given any exhibition of contests of speed and races between horses for the purpose of improving the stock of trotting and pacing horses; that it has never established or maintained any fair grounds in the City or county of St. Louis, or any other

6 place;

And your Informant further states that the trials or contests of speed and power of endurance between horses which were at all the times herein mentioned made and took place upon said Delmar race track, were conducted under the direction, management and control of said respondent, acting through its officers, agents, employees and representatives in charge of its said business, and that said trials or contests of speed and power of endurance between said horses were conducted by said respondent at the times herein alleged for the purpose of enabling the said respondent to do the things and acts hereinbefore alleged to have been done by said respondent, in violation of the laws of this State. That said acts and things done by said respondent as aforesaid, constituted all of the business transacted or things done by said respondent under and by virtue of the franchise and authority conferred upon said respondent as a body corporate under the charter granted to said respondent by the State of Missouri. That by reason of the facts herein stated, said respondent has wilfully continuously and unlawfully misused and abused the franchises, privileges and authority conferred upon it by the laws of the State of Missouri as aforesaid; and that the commission by said respondent of the acts as herein stated in violation of the laws of the State of Missouri have been of great harm and injury to the public and a perversion and misuser of the franchises granted to it by the State of Missouri, and a usurpation of franchises and privileges not granted to said respondent by the State of Missouri; all to the great injury of the general public and the State of Missouri.

Wherefore, Herbert S. Hadley, Attorney General of the State of Missouri, who prosecutes in this behalf for the State of Missouri, prays the consideration of the court here in the premises, that pro-

cess of law may issue against said respondent, and that said respondent may be ousted of all its franchises and corporate privileges and that the same may be declared forfeited and that all of the property, real and personal, of said respondent be declared forfeited unto the State.

7 HERBERT S. HADLEY,
Attorney General.
JOHN KENNISH,
Assistant Attorney General.

And which said order to clerk for issuance of order to show cause is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, April Term, 1905.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,
vs.
DELMAR JOCKEY CLUB, Respondent.

Order to Clerk for Issuance of Order to Show Cause.

Whereas, Herbert S. Hadley, Attorney General of the State of Missouri, has filed in the office of the Clerk of the Supreme Court, in vacation, an information in the nature of a *quo warranto* against the Delmar Jockey Club,

Now, Therefore, it is ordered by the Court that an order to show cause, directed to said respondent, issue from the office of the Clerk of this Court, returnable upon the 10th day of October, 1905.

W. C. MARSHALL,
Acting Chief Justice of the Supreme Court of Missouri.

Thereupon on said 28th day of July, 1905, the clerk of said Court issued said order to show cause, which said order is in words and figures as follows, to-wit:

8 In the Supreme Court of Missouri. In Vacation.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,
vs.
DELMAR JOCKEY CLUB, a Corporation, Respondent.

Order to Show Cause.

To Delmar Jockey Club, Respondent, Greeting:

Whereas, Herbert S. Hadley, Attorney General of the State of Missouri, has filed an information in the nature of a *quo warranto*, a copy of which is hereto attached and made a part hereof, charging

that the Delmar Jockey Club is perverting, abusing and misusing the franchises, privileges, and authority conferred upon it by the laws of the State of Missouri and usurping franchises and privileges not granted said respondent by the State of Missouri, as therein charged and set forth, and asking that said respondent be ousted of all its franchises, corporate privileges and authority as therein set forth,

Now, therefore, you, the said respondent, Delmar Jockey Club, are hereby commanded to be and appear before the Supreme Court of the State of Missouri, *En Banc*, upon the 10th day of October, 1905, and show by what warrant or authority you claim to hold, use and exercise corporate rights, privileges and franchises under the laws of the State of Missouri, and why you should not be ousted from your franchises, corporate privileges and authority to do business in the State of Missouri, and why your property should not be forfeited unto the State.

Witness my hand as clerk of the Supreme Court of the State of Missouri, and the Seal of said Court hereto affixed. Done at my office in the City of Jefferson, this 28th day of July 1905.

[SEAL.] JNO. R. GREEN,
Clerk of the Supreme Court.

9 I hereby certify that I executed the within writ on the 31st day of July 1905 by delivering a true copy of the same to Louis Cella—President of the Delmar Jockey Club.

J. H. FINKS, *Marshal.*

Marshal's Fees.

Serving 1 writ	$1.00.
250 miles 5c	12.50.
	$13.50.

In the Supreme Court of Missouri. In Vacation.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,

vs.

DELMAR JOCKEY CLUB, a Corporation, Respondent.

Comes now Herbert S. Hadley, Attorney General of the State of Missouri, who in this behalf prosecutes for the State, and informs the court that the Delmar Jockey Club was organized as a corporation under the provisions of Article I and Article II of Chapter 12 of the Revised Statutes of the State of Missouri for 1899, and the acts amendatory thereof, on or about the 18th day of January, 1901; that the capital stock of said corporation, as stated in the articles of association thereof, was one hundred thousand dollars ($100,000.00), divided into one thousand (1,000) shares of the par value of one hundred dollars ($100.00) each, and the purposes for which said

corporation was formed, as alleged in said articles of association, were as follows:

"The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of
10 speed and races between horses, for premiums, purses and other awards and otherwise; to establish and maintain suitable fair grounds and a race track in the City and County of St. Louis, with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track, public exhibitions of agricultural products and stock and of speed, or races, between horses, for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto and to said grounds and track; to engage in pool-selling, bookmaking and registering bets on exhibitions of speed or races at the said race track and premises, as provided by law, and to let the right to others to do the same; to conduct restaurants, cafés, and other stands, for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

Your informant further states that since the organization of said Delmar Jockey Club it has become the owner of and is now, and at all times hereinafter mentioned, was the occupant of and in charge of a certain tract of land, lying partly in the City of St. Louis and partly in the County of St. Louis, upon which said land there was located a race track, and besides other buildings, erections and improvements, a certain shed or building, known as the betting ring or shed, for the purpose of having conducted therein pool-selling, bookmaking, recording and registering of bets upon contests of speed or powers of endurance between certain horses upon said race track, and of which said shed or building said respondent, through its officers, agents and representatives, is now and at all the times hereinafter mentioned was, the occupant of and in charge of.

Your informant further states that said respondent, ever since its organization, has continuously, notoriously and wilfully, within this State and at the County and City of St. Louis aforesaid, offended against and violated the laws of this State, and has grossly perverted, abused and misused its corporate authority, franchises and privileges and has unlawfully assumed and usurped franchises
11 and privileges not granted to it by the laws of the State of Missouri, and especially in the following particulars, to-wit: That from the 18th day of January, 1901, up to the 16th day of June, 1905, said respondent, through its officers, agents and employees, conducted within the building known as the betting ring or shed, hereinbefore mentioned, on the Delmar race track, the business of bookmaking and pool-selling, registration of bets and the acceptance of bets, and that during said period, said respondent, acting through its officers, agents and employees in charge of its said business, continuously, notoriously and wilfully violated the laws of this State, in that it sold pools and accepted and registered bets

from minors upon the result of contests of speed or power of endurance, known as horse races between horses, run on the track of said respondent. That since said 16th day of June, 1905, the said respondent, acting through the officers, agents, employees and representatives in charge of the business of said respondent, has further continuously, notoriously and wilfully offended against and violated the laws of this State, in this, to-wit: It has continuously kept and occupied within this State its said shed or building, known as the betting ring or shed, above described, located upon said Delmar race track, with certain books, instruments or devices for the purpose of recording or registering bets and wagers upon the result of trials or contests of speed or power of endurance of horses, which were made and took place upon the said race track of said respondent; and it had, through its officers, agents, employees and representatives in charge of the conduct of its business continuously recorded and registered bets and wagers upon the result of trials or contests of speed and power of endurance between certain horses, which were made and took place upon said race track of said respondent; the said respondent, acting through its officers, agents, employees and representatives in charge of its said business, and being the owner, occupant and person in charge of said shed or building, known as the betting ring or shed, as above described, has continuously upon said Delmar race track knowingly permitted said shed or building to be used and occupied for the purpose of recording and registering bets and
12 wagers upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track. And said respondent, acting through its officers, agents, employees and representatives in charge of the conduct of its said business, has continuously kept, exhibited, used and employed in said building, and continuously and knowingly permitted to be kept, exhibited, used and employed in said building, known as the betting ring or shed, upon said Delmar race track, certain devices and apparatus for the purpose of recording bets and wagers upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track.

Your informant further states that said respondent has never given any exhibition of agricultural products for the purpose of encouraging and promoting agriculture, or for any other purpose; that it has never given any exhibitions of contests of speed and races between horses for the purpose of improving the stock of trotting and pacing horses; that it has never established or maintained any fair grounds in the City or County of St. Louis, or any other place:

And your informant further states that the trials or contests of speed and power of endurance between horses which were at all the times herein mentioned made and took place upon said Delmar race track, were conducted under the direction, management and control of said respondent, acting through its officers, agents, employees and representatives in charge of its said business, and that said trials or contests of speed and power of endurance between said

horses were conducted by said respondent at the times herein alleged for the purpose of enabling the said respondent to do the things and acts hereinbefore alleged to have been done by said respondent, in violation of the laws of this State. That said acts and things done by said respondent as aforesaid, constituted all of the business transacted or things done by said respondent under and
13 by virtue of the franchise and authority conferred upon said respondent as a body corporate under the charter granted to said respondent by the State of Missouri. That by reason of the facts herein stated, said respondent has wilfully, continuously and unlawfully misused and abused the franchises, privileges and authority conferred upon it by the laws of the State of Missouri as aforesaid; and that the commission by said respondent of the acts as herein stated in violation of the laws of the State of Missouri have been of great harm and injury to the public and a perversion and misuser of the franchises granted to it by the State of Missouri, and a usurpation of franchises and privileges not granted to said respondent by the State of Missouri; all to the great injury of the general public and the State of Missouri.

Wherefore, Herbert S. Hadley, Attorney General of the State of Missouri, who prosecutes in this behalf for the State of Missouri, prays the consideration of the court here in the premises that process of law may issue against said respondent, and that said respondent may be ousted of all its franchises and corporate privileges and that the same may be declared forfeited and that all of the property, real and personal, of said respondent be declared forfeited unto the State.

HERBERT S. HADLEY,
Attorney General.
JOHN KENNISH,
Assistant Attorney General.

And afterwards, to-wit, on the 10th day of October, 1905, the following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Comes now the said respondent by attorneys, and files its demurrer herein.

Which said demurrer is in words and figures as follows, viz:

14 In the Supreme Court of Missouri, October Term, 1905.

STATE OF MISSOURI *ex Informatione*, etc.,
vs.
DELMAR JOCKEY CLUB.

Demurrer of Respondent.

The respondent now comes and says, that the information filed herein is insufficient in law and that it ought not to be required to

answer the same; and the respondent further says, that the said information is so insufficient in this:

1. That the portion, which relates to acts of book-making, pool-selling and registration of bets described as the business carried on by the respondent from January 18, 1901, to June 16, 1905, does not state violations of law, because such acts were lawful, there being no averment that the defendant was not licensed to do such acts;

2. That portion which alleges, that the respondent during such period "sold pools and accepted and registered bets from minors" does not state violations of law, because it is not alleged that the respondent knew, that the persons whose bets were registered were minors and there is no averment, that the respondent was licensed to sell pools or register bets;

3. That portion which relates to acts of book-making and registering bets and to acts of permission to others to make books or register bets, and to keeping and using devices for recording bets, after June 16, 1905, does not state violations of law, because a corporation cannot commit a felony, or felonies, and the offense of book-making, pool-selling or registering bets and the like is denounced a felony by the Statutes of this State;

4. That the information does not state any facts upon which a judgment of ouster could lawfully be based, for the obvious reason, that to violate a criminal statute is not the usurpation, or misuser of a franchise, there being a marked difference between franchises and felonies or misdemeanors and *quo warranto* will not lie to compel the observance of a criminal statute, or to punish its violation;

5. The information neither alleges nor charges that the stockholders of the defendant corporation directed or authorized its alleged officers to violate the criminal laws of the State or to commit the felonies charged in said information.

6. The information neither alleges nor charges that any of the officers or agents of said corporation have been prosecuted under indictment or upon verified information for the felonies charged therein and have been after trial found guilty thereof, but seeks to have this honorable court convict certain persons of the felonies charged in said information without the intervention of constitutional methods and in a manner unknown "to the law of the land."

7. That said information shows on its face that it seeks to deprive the stockholders of said corporation of their property without due process of law and without due conviction of any of the agents and officers of said corporation of the felonies imputed to it in said information.

8. Because said information seeks to have this court adjudge specific persons to be guilty of felonies without the aid of a prior indictment or verified information charging such offenses and without trial by jury as guaranteed in the Constitution of the State.

9. That the Act of the General Assembly, entitled "An Act prohibiting book-making and pool-selling and prescribing a penalty therefor," approved March 21, 1905, is void, because it violates Section 28 of Article 4 of the Constitution, in that it contains two sub-

jects, to-wit the prohibition of book-making and the prohibition of pool-selling, which are two distinct subjects matter, which have no relation to each other and are not germain.

Wherefore the defendant prays judgment, etc.

CHESTER H. KRUM,
BOND & BOND,
For Respondent.

16 And afterwards, to-wit, on the 27th day of October, 1905, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Comes now the said Informant and files his motion for judgment on the pleadings herein.

Which said motion for judgment on the pleadings is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1905.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,
vs.
DELMAR JOCKEY CLUB, a Corporation, Respondent.

Comes now the State of Missouri by Herbert S. Hadley, Attorney General, and moves the Court to enter judgment of ouster, as prayed for in the petition for the reason that respondent has failed to file a return sufficient in law or to show reasons therein why judgment of ouster should not be rendered as prayed for in said information.

HERBERT S. HADLEY,
Attorney General.

And afterwards, to-wit, on the 28th day of October, 1905, the further following proceedings were had in said cause, viz:

17 STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Come now the said parties by attorneys, and after arguments herein, submit this cause to the court.

And afterwards, to-wit, on the 22nd day of December, 1905, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,

vs.

DELMAR JOCKEY CLUB, Respondent.

Quo Warranto.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the defendant's demurrer, as to the first ground, should be sustained, and as to all the others, overruled; It is further ordered by the court that the said defendant plead over within fifteen days, and failing so to do, that judgment be entered ousting the defendant of all its franchises. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

In the Supreme Court of Missouri.

Court in Banc, October Term, 1905.

No. 13042.

STATE OF MISSOURI *ex Information* HERBERT S. HADLEY, Attorney General, Informant,

vs.

DELMAR JOCKEY CLUB, a Corporation, Respondent.

This is an original proceeding begun in this court by the Attorney General by filing herein, *ex-officio* an information in the
18 nature of a *quo warranto* against the defendant corporation, the purpose of which is to oust it of its franchises and corporate privileges, to have the same declared forfeited, and all of the property, real and personal, of said defendant, forfeited, to the state.

The information filed by the Attorney General, leaving off the formal parts, is as follows:

"Comes now Herbert S. Hadley, Attorney General of the State of Missouri, who in this behalf prosecutes for the State, and informs the court that the Delmar Jockey Club was organized as a corporation under the provisions of Article 1 and Article IX of Chapter 12 of the Revised Statutes of the State of Missouri for 1899, and the acts amendatory thereof, on or about the 18th day of January, 1901; that the capital stock of said corporation, as stated in the articles of association thereof, was One Hundred Thousand Dollars ($100,000.00) divided into one thousand (1000) shares of the par value of One Hundred Dollars ($100.00) each, and the purposes for which said corporation was formed, as alleged in said articles of association were as follows:

"The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock,

particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses, and other awards and otherwise; to establish and maintain suitable fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track, public exhibitions of agricultural products and stock, and of speed, or races, between horses, for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto, and to said grounds and track; to engage in pool selling, bookmaking, and registering bets on exhibitions of speed or races at the said race track and premises, as provided by law, and to let the right to others to do the same; to conduct restaurants, cafés, and other stands, for the sale of
19 food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

Your informant further states that since the organization of said Delmar Jockey Club it has become the owner of and is now, and at all times hereinafter mentioned, was the occupant of and in charge of a certain tract of land, known as the Delmar race track, lying partly in the City of St. Louis and partly in the County of St. Louis; upon which said land there was located a race track, and besides other buildings, erections and improvements, a certain shed or building, known as the betting ring or shed, for the purpose of having conducted therein poolselling, bookmaking, recording and registering of bets upon contests of speed or powers of endurance between certain horses, upon said race track, and of which said shed or building said respondent, through its officers, agents and representatives is now and at all times hereinafter mentioned was, the occupant of and in charge of.

Your informant further states that said Respondent, ever since its organization, has continuously, notoriously and wi-fully, within this State and at the county and City of St. Louis aforesaid, offended against and violated the laws of this State, and has grossly perverted, abused and misused its corporate authority, franchises, and privileges and has unlawfully assumed and usurped franchises and privileges not granted to it by the laws of the State of Missouri, and especially in the following particulars, to-wit: That from the 18th day of January, 1901, up to the 16th day of June, 1905, said respondent, through its officers, agents and employés, conducted within the building, known as the betting ring or shed, hereinbefore mentioned, on the Delmar race track, the business of bookmaking and poolselling, registration of bets and the acceptance of bets, and that during said period, said respondent, acting through its officers, agents and employés in charge of its said business, continuously, notoriously and wilfully violated the laws of this State, in that it sold pools and accepted and registered bets from minors upon the result of contests of speed or power of endurance known as horseraces between
20 horses, run on the track of said respondent. That since said 16th day of June, 1905, the said respondent, acting through

the officers, agents employés and representatives in charge of the business of said respondent, has further continuously, notoriously and wilfully offended against and violated the laws of this State, in this, to-wit: It has continuously kept and occupied within this State its said shed or building, known as the betting ring or shed, above described located upon said Delmar race track, with certain books instruments or devices for the purpose of recording or registering bets and wagers upon the result of trials of contests of speed or power of endurance of horses, which were made and took place upon said race track of said respondent; and it has, through its officers, agents, employés and representatives in charge of the conduct of its business continuously recorded and registered bets and wagers upon the result of trials or contests of speed and power of endurance between certain horses, which were made and took place upon said race track of said respondent; the said respondent, acting through its officers, agents, employees and representatives in charge of its said business, and being the owner, occupant and person in charge of said shed or building, known as the betting ring or shed, as above described, has continuously upon said Delmar race track knowingly permitted said shed or building to be used and occupied for the purpose of recording and registering bets and wagers upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track. And said respondent, acting through its officers, agents, employés and representatives in charge of the conduct of its said business, has continuously kept, exhibited, used and employed in said building, and continuously and knowingly permitted to be kept, exhibited, used and employed in said building, known as the betting ring or shed, upon said Delmar race track, certain devices and apparatus for the purpose of recording bets and wagers upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track.

21 Your informant further states that said respondent has never given any exhibition of agricultural products for the purpose of encouraging and promoting agriculture, or for any other purpose; that it has never given any exhibition of contests of speed and races between horses for the purpose of improving the stock of trotting and pacing horses; that it has never established or maintained any fair grounds in the City or county of St. Louis, or any other place.

And your informant further states that the trials or contests of speed and power of endurance between horses which were at all the times herein mentioned made and took place upon said Delmar race track, were conducted under the direction, management and control of said respondent, acting through its officers, agents, employés and representatives in charge of its said business, and that said trials or contests of speed and power of endurance between said horses were conducted by said respondent at the times herein alleged for the purpose of enabling the said respondent to do the things and acts hereinbefore alleged to have been done by said respondent, in violation

of the laws of this State. That said acts and things done by said respondent as aforesaid, constituted all the business transacted or things done by said respondent under and by virtue of the franchise and authority conferred upon said respondent as a body corporate under the charter granted to said respondent by the State of Missouri. That by reason of the facts herein stated said respondent has wilfully continuously and unlawfully misused and abused the franchises, privileges and authority conferred upon it by the laws of the State of Missouri as aforesaid and that the commission by said respondent of the acts as herein stated in violation of the laws of the State of Missouri have been of great harm and injury to the public and a perversion and misuser of the franchises granted to it by the State of Missouri, and a usurpation of franchises and privileges not granted to said respondent by the State of Missouri; all to the great injury of the general public and the State of Missouri.

Wherefore, Herbert S. Hadley, Attorney General of the
22 State of Missouri, who prosecutes in this behalf for the State of Missouri, prays the consideration of the court here in the premises that process of law may issue against said respondent, and that said respondent may be ousted of all its franchises and corporate privileges and that the same may be declared forfeited, and that all of the property, real and personal, of said respondent, be declared forfeited unto the State.

Defendant filed demurrer to said information, as follows:

"The respondent now comes and says that the information filed herein is insufficient in law, and that it ought not to be required to answer the same; and the respondent further says that the said information is so insufficient in this:

1. That the portion, which relates to acts of bookmaking, poolselling, and registration of bets described as the business carried on by the respondent from January 18, 1901, to June 16, 1905, does not state violations of law, because such acts were lawful, there being no averment that the defendant was not licensed to do such acts.

2. That portion which alleges that the respondent during such period "sold pools and accepted and registered bets from minors," does not state violations of law, because it is not alleged that the respondent knew that the persons whose bets were registered were minors, and there is no averment that the respondent was licensed to sell pools or register bets.

3. That portion which relates to the acts of bookmaking and registering bets and acts of permission to others to make books or register bets, and to keeping and using devices for recording bets, after June 16, 1905, does not state violations of law, because a corporation cannot commit a felony, or felonies, and the offense of bookmaking, poolselling, or registering bets and the like is denounced a felony by the Statutes of this State.

4. That the information does not state any facts upon which a judgment of ouster could lawfully be based, for the obvious reason,
that to violate a criminal statute is not the usurpation, or
23 misuser of the franchise, there being a marked difference between franchises and felonies or misdemeanors and *quo*

warranto will not lie to compel the observance of a criminal statute, or to punish its violation.

5. The information neither alleges nor charges that the stockholders of the defendant corporation directed or authorized its alleged officers to violate the criminal laws of the State or to commit the felonies charged in said information.

6. The information neither alleges nor charges that any of the officers or agents of said corporation have been prosecuted under indictment or upon verified information for the felonies charged therein, and have been after trial found guilty thereof, but seek to have this honorable court convict certain persons of the felonies charged in said information without the intervention of constitutional methods, and in a manner unknown "to the law of the land."

7. That said information shows on its face that it seeks to deprive the stockholders of said corporation of their property without due process of law and without due conviction of any of the agents and officers of said corporation of the felonies imputed to it in said information.

8. Because said information seeks to have this court adjudge specific persons to be guilty of felonies without the aid of a prior indictment or verified information charging such offenses, and without trial by jury, as guaranteed in the Constitution of the State.

9. That the act of the General Assembly, entitled "An Act prohibiting bookmaking and poolselling and prescribing a penalty therefor," approved March 21, 1905, is void, because it violates section 28 of article 4 of the Constitution, in that it contains two subjects, to-wit: the prohibition of bookmaking and the prohibition of poolselling which are two distinct subject matter, which have no relation to each other, and are not germain.

Wherefore the defendant prays judgment, etc."

After the demurrer was filed, the State filed a motion for
24 judgment upon the pleadings. But such motion was unnecessary, since judgment, as a matter of course, must be for the State if the demurrer be not sustained and the defendant does not plead over; and nothing more will, therefore be said regarding it.

The defendant's demurrer to the information in effect admits every material allegation in the information contained, but it does not admit mere legal conclusions, if any, stated in the information. This being the effect of the demurrer, it follows that all the acts charged in the information to have been committed by defendant in violation of law, after the 16th day of June, 1905, being material, stand admitted. But defendant contends that as such acts are declared by statute to be felonies, and that as a corporation cannot commit felony, the violation of its charter in this respect, therefore, constitutes no ground for forfeiting its charter. That a corporation cannot have a felonious intent, and cannot, therefore, be prosecuted for a felony is clear. It is equally clear, however; that an officer of a corporation, in charge of its affairs, may as such officer do that which the statute declares to be a felony in like manner as he may

do that which the statute declares to be a misdemeanor. There is no difference in principle. (Bank of Vincennes *v.* State, 1 Blackford's (Ind.) Reports, 267; 5 Thompson's Commentaries on the Law of Corporation-, secs. 6621, 6622.

It is unnecessary to cite authorities to show that no felony can be committed without a felonious intent, for this is well settled law. Upon this question, however, the defendant cites the case of the Commonwealth *v.* New Bradford Bridge Company, 2 Gray, 39 which is deserving of more than a passing notice. In that case the defendant bridge company was prosecuted by indictment for maintaining a nuisance. The court said:

"The indictment in the present case is for a nuisance. The defendants contend that it cannot be maintained against them on the ground that a corporation, although liable to indictment for nonfeasance, or an omission to perform a legal duty or obligation, is not amenable in this form of prosecution for misfeasance, or the doing of any act unlawful in itself and injurious to the rights of others." "There are *dicta* in some of the early cases which sanction this broad doctrine, and it has thence been copied into text writers, and adopted to its full extent in a few modern decisions. But if it ever had any foundation, it had its origin at a time when corporations were few in number, and limited in their powers, and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it, and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible. In their legal duties and responsibilities, to individuals. To a certain extent, the rule contended for is founded in good sense and sound principle. Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offenses against the person, but beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass upon private property, or obstruct a way to the special injury and damage of an individual no one can doubt their liability therefor. In like manner and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses. Angell & Ames on Corp. Secs. 394-396. Maund *vs.* Monmouthshire Canal 4 Man. & Gr. 452, and 5 Scott N. R.

457. The Queen *vs.* Burmingham & Glouchester Railway 3 Ad. & El. N. R. 223. The Queen *vs.* Great North of England Railway, 9 Ad. & El. N. R. 315, and 2 Cox C. C. 70. Eastern Counties Railway *vs.* Broom, 6 Exchequer Reports, 314. The State *vs.* Morris & Essex Railroad, 3 Zab. 360."

It is apparent that this decision is not an authority for the contention that a corporation is not subject to an action of *quo warranto* to oust it of the franchises conferred upon it, for a misuse or preversion of them, or that a corporation is exempt from the consequences of unlawful and wrongful acts committed by its agents in pursuance of authority derived from its charter. The information charges that respondents, "acting through its officers, agents, employés and representatives in charge of its business," engaged in the acts of misuser charged against it in the information. It will thus be seen that the unlawful act charged is not against the officers, agents, employés and representatives of the corporation, but against the corporation itself. There can be no doubt that a corporation may be proceeded against by *quo warranto* for misuse or perversion of the franchise conferred upon it by the State, notwithstanding its officers and agents may at the same time be amenable to the criminal law for offense committed by them in the perversion of such franchise. If a corporation, through its servants and agents, may be guilty of such abuses of its franchise as will subject it to ouster by *quo warranto*, we can conceive of no reason why such servants and agents, if the acts and abuses committed by them be in violation of the criminal statutes, may not at the same time be prosecuted by indictment or information. The one is not a bar to the other proceeding. Nor are we prepared to give assent to the contention that the defendant corporation could not be held to answer for such wrongful acts until its agents, guilty of the criminal offense, be tried and convicted.

It is argued by defendant that forfeiture will not lie for an illegal act committed by a corporation. It is true that not for every illegal act will the charter of a corporation be forfeited; but the char-
27 ter of the defendant is a contract with the State that it will use the franchises therein granted; that it will not misuse or pervert other franchises, and that it will not engage in the doing or carrying on of any business which is unlawful or immoral.

But it is claimed for defendant that the only violation of law by it which would justify an action in *quo warranto* would be a violation "of the organic law" from which the corporation derived its existence. In support of this position we are cited to the case of the Illinois Trust and Savings Bank *v.* Doud, 195 Fed. Rep. 123. It was held in that case that no corporation is required to exercise all the powers conferred upon it as a condition to the exercise of any of them, unless such requirement is expressly made in some statute under which it obtains some of its powers and privileges, or its powers are inseparably connected with each other, and that it is only for the violation of an express provision of the law under which a corporation derives its powers and privileges, or for such a misuse or non-use of the latter as results in a substantial failure to fulfill the design and purpose of its organization, that a forfeiture of its franchise will be

decreed; and defendant contends that as the statute under which it obtained its powers and privileges does not expressly require that it establish and maintain fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections and improvements, and give or conduct on said grounds and race track public exhibitions of agricultural products and stock, a forfeiture of its charter should not be declared, unless the misuse or non-use of its franchises results in a substantial failure to fulfil the design and purpose of its organization. It is expressly provided in the charter of the defendant that "the purposes for which this corporation is formed are to encourage and promote agriculture; * * * to establish and maintain suitable fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track public exhibitions of agricultural products and stock, and of speed, or races, be-
28 tween horses, for premiums, prizes or other awards, made up from fees or otherwise, and to charge the public for admission thereto and to said grounds and race track." It is alleged in the petition, and stand- admitted by the demurrer, that defendant failed to comply with its charter in the respect indicated, and there is no escaping the conclusion that its non-use of those franchises resulted in a substantial failure to fulfil the design and purpose of its organization, for which a forfeiture of all of its franchises should be decreed, unless such forfeiture has in some way been waived by the State.

In State *v.* New Orleans Gas Light & Banking Co., 2 Rob. (La.) 529, it is said: "It may be proper to state that it is now well settled that an act of incorporation may be forfeited for a misuse of the powers entrusted to it. It is a tacit condition of a great incorporation that the grantees shall act up to the end and design for which they were incorporated. If they do not, the rights and privileges granted may be withdrawn." (5 Thompson on Corp. Sec. 6609; Turrett *v.* Taylor, 9 Cranch, 43; State *ex rel. v.* Lincoln Trust Co. 144 Mo. 562.)

It is further contended by defendant that it was not the intention of the legislature, upon any principle of rational construction, to make it a condition of the corporate life of racing associations that they should not only provide the funds for the state fair at Sedalia, but also, at the same time, conduct private fairs within their own local racing grounds: that this was not the intention of the legislature in the permissive grant, which was fully subserved by the money contributed to the state fair at Sedalia, and that it is only the non-user of some business franchise which affects the public which the courts would consider upon an information alleging such non-user as a ground for forfeiture; that in the case at bar the public was more benefited by the contribution of money to the support of the fair at Sedalia, on behalf of the people of the entire state, and in exhibition of the products of the State there, than if a local exhibition of
29 the products of St. Louis county had been given by the respondent corporation. In reply, we may be permitted to say that it is not our province to say that the public was in no way con-

cerned about local exhibitions in St. Louis county of agricultural products and stock. At any rate, we are unwilling to declare that the public was not interested in such exhibitions. For many years such exhibitions have been held annually by corporations, all over the State, their object and purpose being the improvement of horticultural and agricultural products, as well as of stock, which would seem to indicate that the public is interested in such exhibitions, and that the public has been seriously injured by the non-user of this franchise.

We are unable to concur in the position that this court will take judicial notice of the fact, even if true, that the defendant has every year created and paid over the fund for the making such exhibitions at the state fair at Sedalia, when in fact no such exhibitions have been held by defendant.

Defendant also contends that the acts of book-making, pool-selling and the registration of bets, alleged to have been committed by defendant between January 18, 1901, and June 16, 1905, were lawful, because it was permitted by its charter to engage in such business and it is not alleged in the information that it was not licensed to do these acts; another contention being that the acts charged against defendant in the registration of bets and the selling of pools to miners were in nowise improper, because it is not pleaded that defendant was a licensed book-maker.

The argument with respect to that portion of the petition which relates to general acts of book-making, between January 18, 1901, and June 16, 1905, is that it does not show violation of the law, because *non constat* the defendant was a licensed book-maker. (§ 7419, Revised Statutes, 1899.)

The State contends that defendant's charter should be forfeited for book-making and pool-selling between January 18, 1901, and June 16, 1905, because that provision of its charter which authorized it to engage in such acts was invalid for the reason that it was not authorized by the organic law; but the laws of this State, and especially sec. 40, Acts of 1895, page 8, recites that "there is hereby appropriated out of the state treasury, chargeable to the "state fair fund," the sum of eight thousand seven hundred and fifteen dollars, received into the state treasury during the years 1903 and 1904, from pool-selling and book-making, as provided by Article 2, Chapter 105, Revised Statutes of Missouri, 1899, thus recognizing the validity of the law from whence defendant derived its power to engage in book-making and poll-selling, and the state having received and appropriated money from this source it will not now be permitted to say that the law under which it was obtained was invalid and of no effect.

It is alleged in the information and admitted by the demurrer that during the time indicated defendant sold pools to and registered bets with minors, which was in violation of law, it having no authority so to do. To make and sell pools and book-bets to minors is expressly prohibited by statute, and any person doing so may be punished as for a misdemeanor. (Sec. 2193, Revised Statutes, 1899.) So that

defendant was without authority from any source to sell pools to or register bets with minors, and in doing so it was exercising a power which it did not possess, the tendency of which was immoral and to encourage minors in dissipation and vicious habits. Defendant *not* contends that the portion of the petition which relates to such sales does not state violations of law, because it is not alleged that the respondent knew at the time that such persons were in fact minors. The statute is an absolute inhibition against selling pools or book bets to minors, and it was entirely unnecessary that the petition should allege that such sales were made to minors, knowing such persons to be minors. It was the defendant's duty to know when sales were made that they were not made in violation of law.

The acts for which a forfeiture of defendant's charter is asked are acts done by the corporation through its officers, agents, em-
31 ployés and representatives in charge of its business, and not any act done by unauthorized persons. A corporation can act only through its agents and servants, and it is responsible to the state for the acts of such agents and servants in the carrying on of the business of the corporation. (State *ex inf. v.* Fire Ins. Co., 152 Mo. 1; State *ex inf. v.* Armour Packing Co. 173 Mo. 356.)

A final contention is that the act of the legislature of 1905 entitled "An act prohibiting book-making and pool-selling and prescribing a penalty thereto," approved March 21, 1905, is void because it violates section 28, Article 4, of the Constitution, in that it contains two subjects, the prohibition of book-making and of pool-selling, which are not germane but incongruous and in discord with each other. The section referred to reads as follows: "No bill * * * shall contain more than one subject, which shall be clearly expressed in its title." Whatever may be the correct definitions of the terms "book-making" and "pool-selling," is wherever either is used it is always understood to have reference to horse racing of some character, and the one is, therefore, germane to the other. When this is the case, the act is not unconstitutional. In State *ex rel. v.* Miller, 100 Mo. 445, it is said: "Its demands are that matters which are incongruous, disconnected and without any natural relation to each other must not be joined in one bill and the title must be a fair index of the subject matter of the bill. A very strict and literal interpretation would lead to many separate acts relating to the same general subject, and thus produce an evil quite as great as the mischief intended to be remedied; hence a liberal interpretation and application must be allowed. In Ewing *v.* Hoblitzelle, 85 Mo. 64, the following rule taken from Sedgwick, was approved: 'Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title, the statute is valid." In State *v.* Morgan, 112 Mo. 202, the court says: "All that the Constitu-
32 tion requires is that the subjects embraced in the act shall be fairly and naturally germane to that recited in the title. State *v.* Bennett, 102 Mo. 357. There can be no doubt but all the provisions of section 1561 are naturally related and germane to one

subject. In an act to punish cheats, frauds, etc., naturally belongs a provision as to what shall be a sufficient statement of the offense in the indictment." The same rule has been announced in numerous decisions of this court since, and it may be regarded as well settled law. Moreover, this court will not declare a law to be unconstitutional unless it be of the opinion that it is so beyond a reasonable doubt, and it holds no such opinion in this case.

Our conclusion is that the defendant's demurrer, as to the first ground, should be sustained, and as to all the others, overruled; that leave be granted to defendant to plead over within fifteen days, and failing so to do, that judgment be entered ousting the defendant of all its franchises.

All concur except Brace, C. J., absent.

G. D. BURGESS, *J.*"

And afterwards, to-wit, on the 30th day of December, 1905, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Comes now the said informant and files his motion to modify the judgment herein.

Which said motion to modify judgment and decree is in words and figures as follows, to-wit:

33 In the Supreme Court of Missouri.

Court en Banc, October Term, 1905.

STATE OF MISSOURI *ex Rel.* HERBERT S. HADLEY, Attorney General,
vs.
DELMAR JOCKEY CLUB, a Corporation, Respondent.

Comes now the State of Missouri by Herbert S. Hadley, Attorney General, and moves the Court to make an order modifying the judgment and decree in the above entitled cause in the following particulars and for the following reasons:

First. That the judgment and the decree of the Court to the effect that the demurrer of respondent be sustained upon the first ground therein stated, be set aside and that said demurrer be overruled for the reason that there is nothing stated in said opinion sufficient in fact or in law to justify the Court in sustaining said demurrer upon said ground, and said judgment sustaining said demurrer upon said ground is based upon a misconception of the facts stated in the pleadings and the law applying thereto.

Second. That the judgment and the decree of the Court allowing the said respondent fifteen days in which to answer be set aside and that final judgment of ouster be rendered against respondent, for

the reason that said respondent having plead to that portion of the information alleging a mis-user, abuse and usurpation of franchises, and having filed no pleading to that portion of the information alleging a non-user of franchises conferred, said respondent should not be permitted to file a second or additional pleading to said information.

HERBERT S. HADLEY,
Attorney General.
JOHN KENNISH,
Ass't Att'y Gen'l.

34 And afterwards, to-wit, on the 3rd day of January, 1906, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Comes now the said respondent by attorney, and files its answer herein.

Which said answer is in words and figures as follows, to-wit:

In the Supreme Court of Missouri. (In Banc.)

No. 13042.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,
vs.
DELMAR JOCKEY CLUB (a Corporation), Respondent.

Respondent's Answer.

Respondent, Delmar Jockey Club, comes by its attorneys and for its answer to the information of the attorney general herein, admits that it is a corporation duly organized and incorporated under the laws of the State of Missouri, and denies each and every other allegation in said information alleged or contained.

Wherefore, respondent prays that it be hence discharged with its costs.

II.

For its further answer to that portion of the information of the attorney general herein, wherein it is alleged that respondent has failed to exercise certain franchises claimed to be possessed by it, this respondent states that it has fully carried out and exer-
35 cised all those provisions in its charter authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed and races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and has provided suitable fair grounds for the same, in this that between

the 18th day of January, 1901, and the 16th day of June, 1905, in pursuance of the provisions and requirements of section 7419 to 7424 inclusive, Revised Statutes of Missouri, 1899, respondent duly paid large sums of money into the treasury of the State of Missouri which were placed by the Treasurer of the State of Missouri to the credit of the State Fair Fund, the same being a fund created by section 7424 Revised Statutes of Missouri, 1899, for the development and advancement of the industrial interests of this State under the direction of the State Board of Agriculture, and that all of said money so paid into said fund was received, used and appropriated by the State of Missouri for the purpose of holding and giving annual exhibitions of agricultural products and stock of every kind and description at the City of Sedalia, State of Missouri, and that the said sums of money paid by respondent into the Treasury of the State of Missouri under the terms of section 7419 to 7424 inclusive, were used and appropriated by the said State of Missouri and its said State Board of Agriculture solely for the maintenance and support of said Missouri State Fair held annually at Sedalia, Missouri, and for the further purpose of providing, constructing, improving and equipping all grounds, stands, and buildings necessary for the holding and giving of said Fair.

Respondent further states that by exacting and receiving the said sums of money for the above mentioned purposes, the said State of Missouri intended to and did accept the same as full and complete performance and use by respondent of its franchise to give exhibitions of agricultural products and stock, and the said State of Missouri thereby intended to and did waive any other or further exercise of such franchise on the part of respondent.

36 Further answering the allegations of non-user from June 16th, 1905, to the date of the filing of this information, towit: July 28th, 1905, respondent states that the franchise of giving exhibitions of agricultural products and stock is not one which can be exercised continuously and at all times from the beginning to the end of the year, but is one, owing to its peculiar character, which can only be exercised during the harvest season of each year. For these reasons, respondent was not required to exercise such franchise between the above specified dates, but respondent further avers that it has in good faith endeavored at all times to exercise the franchises granted to it by its articles of incorporation in the manner and for the purposes intended by such grants, and that such is its purpose in the future, and respondent intends in every way to comply with and perform according to law all the obligations which it assumed upon the grant of the aforesaid franchises to it by the State of Missouri, and respondent again specifically denies each and every charge, allegation or assertion of a contrary purpose on its part, contained in the information filed herein.

Wherefore, respondent prays that it be hence discharged with its costs.

BOND & BOND,
C. H. KRUM,
Attorneys for Respondent.

And afterwards, to-wit, on the 23rd day of January, 1906, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Now at this day, the court having fully considered and understood the motion heretofore filed to modify the judgment and de-
37 cree herein, doth order that said motion be overruled; comes also the said informant and files his reply to the respondent's answer herein.

And afterwards, to-wit, on the 25th day of January, 1906, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Comes now the said informant by attorney and withdraws his reply herein; and thereupon said informant files his motion for judgment on the pleadings herein.

Which said motion for judgment on the pleadings is in words and figures as follows, to-wit:

In the Supreme Court of Missouri.

Court en Banc, October Term, 1905.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,
vs.
DELMAR JOCKEY CLUB, a Corporation, Respondent.

Motion for Judgment on the Pleadings.

Comes now Herbert S. Hadley, Attorney General of the State of Missouri, who in this behalf prosecutes for the State, and moves the Court for judgment on the return and answer of respondent herein, for the following reasons:

First. That said return and answer fails to state facts showing any sufficient cause or excuse for, or any legal defense to, the non-
user of respondent's franchises authorizing it to give exhibi-
38 tions of agricultural products and exhibition of contests of speed or races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and for the establishing and maintaining of suitable fair grounds in the city and county of St. Louis, as set-forth and charged in the information herein.

Second. It appears from the facts stated in said return and answer, and the second count thereof, that respondent is guilty of the acts of mis-user and abuser of its franchises charged in the information herein filed, in this towit, that respondent engaged in the business of bookmaking and poolselling, registration of bets and the acceptance of bets in violation of the laws of this State:

Wherefore, Informant prays that final judgment of ouster be rendered against the respondent as prayed for in the information in this case.

HERBERT S. HADLEY,
Attorney General.
JOHN KENNISH,
Ass't Attorney General.

And afterwards, to-wit, on the 27th day of January, 1906, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Comes now the said respondent by attorney, and files its motion to strike from the files the motion for judgment on the pleadings filed by said informant January 25, 1906.

Which said motion to strike from the files the motion of informant for judgment on the pleadings, is in words and figures as follows, viz:

39 In the Supreme Court of Missouri. (En Banc.)

No. —.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,
vs.
DELMAR JOCKEY CLUB, a Corporation, Respondent.

Motion of Respondent to Strike from the Files the Motion of Informant for Judgment on the Pleadings Filed in this Court on the 24th of January, 1906.

Respondent comes by its attorneys and moves this honorable court to strike from the files the "motion for judgment on the pleadings" filed by informant for the following reasons:

I.

In and by the first ground of said motion, informant states that the answer of respondent heretofore filed by leave of this court, sets forth no defense to the allegation of nonuser by respondent of its franchise "authorizing it to give exhibitions of contests of speed or races between horses for the purpose of encouraging and promoting

agriculture and the improvement of stock, and for establishing suitable fair grounds in the City and County of St. Louis."

Whereas the record expressly shows by the language used in said answer that it contains a general denial of each and every allegation contained in the information filed in this cause thus necessarily traversing the allegation of non-user made in the information.

Because the record expressly shows that respondent's answer made the further defense, that the State of Missouri waived the giving of local fairs by respondent between the 18th day of January, 1901, and the 16th day of June, 1905, and that during said period respondent in all respects lawfully exercised and used the franchises granted to it by the State of Missouri in the manner authorized by law.

Because the record expressly shows that the language used in said answer in its concluding paragraph merely averred that no duty was imposed upon respondent to exercise the particular franchise of holding fairs and making agricultural exhibitions, between the dates of June 16th, 1905, and July 28, 1905, which two defenses, traverse and waiver, fully meet all the allegations of the information and preclude any judgment before taking and submitting proofs.

II.

Because the second ground of informant's motion for judgment on the pleadings wherein it is alleged that respondent in and by the second defense made in its answer, stated it was "engaged in the business of bookmaking, pool selling etc" is a mis-statement of the record and is contradicted by the terms of the second count contained in respondent's answer as will appear from an inspection of the averments thereof. The allegations contained in said second count of respondent's answer in effect are: That between the 18th of January, 1901, and the 16th of June, 1905, respondent paid over the money for the support of the State Fair at Sedalia prescribed by law, and that the State of Missouri in consideration thereof waived the giving of local fairs by respondent during said period. It is thus apparent that the record contradicts the matters set forth in the second ground of informant's present motion for judgment on the pleadings.

Again, even if respondent had admitted in its answer that between the dates alleged it was "engaged in book-making etc," still it would not have been prejudiced by such admission. Since this Honorable Court in its recent opinion herein expressly held that respondent's corporate franchises could not be annulled for the doing of such acts *during that period*. Respondent's original demurrer on this point, was sustained by this court in its opinion heretofore rendered in this cause.

III.

Because the present motion filed by informant is but a rehash of the positions heretofore taken by him in his oral argument, in his brief filed upon the original demurrer of respondent, and in his motion, and argument in support thereof, made by him seeking to induce the court to modify its original opinion upon the original de-

murrer filed by respondent. Wherefore respondent submits that said positions and arguments are not entitled to be considered a fourth time in this cause.

IV.

Because the proper way to raise the questions attempted to be made in the last motion filed by informant (if they had not been heretofore adversely ruled) would be by a demurrer addressed to the second and third defenses contained in respondent's answer. The reason being that said answer of respondent contains first a defense consisting of a general denial of all the allegations contained in the information filed in this cause, which defense goes to the information as an entirety, and is not affected by the subsequent defenses setting up waiver, etc. If these subsequent defenses are insufficient at law they should be attacked by demurrer, which even if sustained would not entitle the demurrant to judgment where the answer, as in the present case, contains the separate defense of a general denial. For the foregoing and divers other reasons, respondent respectfully moves the court to strike from the files the last motion filed in this cause by the informant.

BOND & BOND,
Attorneys for Respondent.

And afterwards, to-wit, on the 26th day of February, 1906, the further following proceedings were had in said cause, viz:

42 STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Now at this day, the court having fully considered and understood the motion heretofore filed by said respondent to strike from the files the motion of said informant for judgment on the pleadings; doth order that said motion to strike from the files be and the same is hereby overruled.

And afterwards, to-wit, on the 5th day of May, 1906, the further following proceedings were had in said cause, viz:

STATE *ex Inf.*, ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Come now the said parties by attorneys, and after arguments herein, submit this cause to the court.

And afterwards, to-wit, on the 1st day of June, 1906, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,
vs.
DELMAR JOCKEY CLUB, a Corporation, Respondent.

And now on this day come again the parties by their respective attorneys and the motion of the Attorney General for judgment of

ouster upon the pleadings heretofore filed and argued, coming
43 on for final judgment, and it now appearing to the Court, that heretofore towit on the 22nd day of December 1905, the demurrer of the respondent to the information of the Attorney General, was overruled as to all the grounds of said demurrer save and except as to the first ground therein specified and leave was granted respondent to plead over to said information within fifteen days thereafter and it further appearing that within the time allowed the respondent herein filed its answer to said information and the Attorney General on January, the 24th, 1906, filed his motion for judgment upon the pleadings notwithstanding said answer and the said motion has been fully argued and submitted to the Court, it is now considered, ordered and adjudged by the Court that the answer of said Delmar Jockey Club, respondent herein, is not sufficient in law and the said respondent has not avoided the cause of action in the Attorney General's information stated and that judgment of ouster from the franchises heretofore granted respondent in its articles of incorporation, by the State of Missouri, ought to be given for the State of Missouri for the nonuse misuse and perversion of said franchises, notwithstanding its said answer, and it is therefore considered ordered and adjudged by the Court that the said Delmar Jockey Club, respondent herein, has failed to show any good and lawful reason for the nonuse misuse, perversion and violation of the franchises granted to it by the State as charged in the information of the State of Missouri by the Attorney General and it is accordingly considered and adjudged that it be and is hereby ousted of all the rights, franchises and privileges granted to it by the State in its articles of incorporation and it is further considered, ordered and adjudged that a fine of five thousand dollars be and is hereby imposed upon said respondent for its unlawful abuse nonuse, misuse and perversion of said franchises and that the State of Missouri have and recover of said respondent the said sum of five thousand dollars as and for such fine and all the costs of this prosecution and have execution therefor. It is further considered, ordered and adjudged that the
44 President and Board of Directors of said Delmar Jockey Club, after satisfying the fine and costs heretofore and herein adjudged, proceed at once to wind up and settle the affairs, collect the outstanding debts and divide and distribute the moneys and other property of said Delmar Jockey Club among the stockholders after paying the debts due and owing by such company at the date of its dissolution, and do and perform all other duties devolving upon them as trustees therefor as provided in section 976 R. S. of Missouri, 1899, and desist from all further exercise of any and all franchises heretofore granted to said Delmar Jockey Club, by virtue of its incorporation under the laws of this State, and desist from all and singular its unlawful practices as charged in the information of the Attorney General, from and after this day.

And afterwards, to-wit, on the 6th day of June, 1906, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Comes now the said respondent by attorney, and files its motion for a rehearing herein.

Which said motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of Missouri. En Banc.

No. 13042.

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,
vs.
DELMAR JOCKEY CLUB, a Corporation, Respondent.

Respondent's Motion for Rehearing.

45 Now comes said respondent and respectfuly moves this Honorable Court to grant it a rehearing herein, and assigns the following grounds -herefor, towit:

First. The Court has inadvertently misconceived the scope and state of the pleadings: In this, that the petition charges a misuse and a nonuse of the privileges conferred on respondent by its charter. The answer denies generally the allegations as to misuse as well as the allegation as to nonuse, and then affirmatively by way of a further defense pleads that the plaintiff is estopped to ask a forfeiture of respondent's franchises, because of mere nonuse.

The judgment herein finds that the respondent has been guilty of abuse, misuse, perversion and nonuse of its franchises. Under the state of the pleadings the respondent is entitled to a trial as to the question of abuse, misuse and perversion. There has been no trial on that issue so joined, yet a judgment without trial has been entered against respondent, thereby denying respondent the benefit of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

On the issues joined no judgment or ouster for mere nonuse could go further than to oust respondent of its franchise to hold fairs, and a fine of Five Thousand Dollars for mere nonuse of a privilege conferred by a charter amounts to a cruel and unusual punishment within the meaning of Article VIII of the Amendment of the Constitution of the United States, which guarantee respondent here invoke.

Second. The respondent is charged with acts of misuse of its corporate franchises. To this charge respondent has interposed a general denial. No trial of this issue has been had, yet the court has adjudged the respondent guilty without a trial and imposed a fine of Five Thousand Dollars. This is not due process of law and vio-

lates the guarantees of the Fourteenth Amendment to the Constitution of the United States, which respondent here invokes.

46 Third. Respondent is charged with nonuse of its corporate franchises as to the right to hold fairs. The general denial of respondent applies to this charge, and there has been no trial as to that fact. Yet the judgment adjudges the respondent guilty without a hearing, thereby also violating the Fourteenth Amendment to the Constitution of the United States.

But, without, this, the plea of estoppel interposed by the respondent to the charge of nonuse does not deprive respondent of the benefit of its general denial of that charge. Even at common law, and certainly since the Statute of Anne, a plea of estoppel may be united with a general denial in a *quo warranto* proceeding.

Fourth. Respondent's Attorneys in interposing the plea of estoppel relied upon the decision of this Court on demurrer (92 S. W. 1. c. 190), and interposed that plea to meet the objections then stated by the court to taking judicial notice of the facts pleaded. If counsel are in error in so pleading, that error was induced by the language of the court in that opinion, and therefore respondent ought not to be prejudiced thereby, but should be permitted to withdraw, if necessary, the plea of estoppel and stand on the general denial.

Fifth. The judgment of ouster ought not to be entered in this case in the present state of the pleadings, for the reason that even though the power conferred by the charter of the respondent to engage in bookmaking and pool selling be regarded as taken away by the repeal of the Breeder's Law, and even though respondent has lost its charter privileges to conduct fairs by failure to exercise those privileges, nevertheless respondent has other privileges conferred by its charter which are not contrary to any law of this State or to the policy of the State, and which have not been lost by nonuser, among which privileges is the right to conduct horse races for prizes or purses or at pleasure and which the judgment of this court deprives respondent of without respondent having in any manner lost the right so to do, and in this respect also the judgment deprives the respondent of its property without due process of law contrary to the guarantees of the Fourteenth Amendment to the Constitution

47 of the United States, which respondent here invokes.

Sixth. It has never been claimed in this proceeding *even by the State* that the answer admits any of the charges of misuse or abuse further than the registering of bets and the making of books *prior to the repeal of the Breeder's law.* Such acts prior to that time were lawful acts under the laws of this State unless the State's contention that a corporation could not obtain a license under the Breeder's law, although such a license might be conferred upon a natural person, be adopted as sound. That contention was rejected by this court in its opinion filed in this cause, (State *ex rel. vs.* Delmar Jockey Club, 92 S. W. 185); and was again rejected by this court when advanced by the Attorney General in support of his motion to modify the ruling on the demurrer, and we cannot believe that your Honors would now take a different view of this question, destructive of the rights of the respondent without at least an ex-

pression of an opinion showing wherein and for what reason the former ruling was unsound. If the court erred in sustaining the first ground of the demurrer, the time to have corrected that error was on the motion to modify the decree when the Attorney General attacked the propriety of the Court's ruling on the same grounds and on the same authorities that he now urges in support of judgment on the pleadings. Since the latter motion has been sustained by your honors we have the incongruity of this court at one stage of a case holding certain allegations insufficient to state an offense, and then the very next time the same case comes up for consideration, the court finds respondent guilty and assesses final judgment against it for an alleged admission of the very charges which the court had previously held stated no offense. It is certainly unfair to counsel who have drafted their pleadings on the faith of the former ruling, to have their client's interests sacrificed and its property confiscated, because the court refuses to stand by its own opinion.

48 Respectfully submitted,

HENRY W. BOND,
THOMAS BOND,
Attorneys for Respondent.

We hereby certify that we served a copy of the within motion upon the State of Missouri by mailing a copy of the same addressed to the Attorney General at his office in Jefferson City, Mo. This fifth (5th) day of June 1906.

HENRY W. BOND,
THOMAS BOND,
Attorneys for Respondent.

And afterwards, to-wit, on the 20th day of June, 1906 the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Now at this day, the court having fully considered and understood the motion heretofore filed by said respondent for a rehearing herein, doth order that said motion be sustained. It is further ordered by the court that the judgment on the pleadings entered herein on the first day of June, 1906, be, and the same is hereby set aside.

And afterwards, to-wit, on the 22nd day of November, 1906, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI *ex Informatione* HERBERT S. HADLEY, Attorney General, Informant,

vs.

DELMAR JOCKEY CLUB, a Corporation, Respondent.

Quo Warranto.

49 And now on this day, come again the parties by their respective attorneys, and the motion of the Attorney General for judgment of ouster upon the pleadings heretofore filed and argued, coming on for final judgment, and it now appearing to the Court, that heretofore, to-wit, on the 22nd day of December, 1905, the demurrer of the respondent to the information of the Attorney General, was overruled as to all the grounds of said demurrer save and except as to the first ground therein specified, and leave was granted respondent to plead over to said information within fifteen days thereafter, and it further appearing that within the time allowed the respondent herein filed its answer to said information and the Attorney General on January 24th, 1906, filed his motion for judgment upon the pleadings notwithstanding said answer and the said motion has been fully argued and submitted to the Court, it is now considered, ordered and adjudged by the Court that the answer of the said Delmar Jockey Club, respondent herein, is not sufficient in law and the said respondent has not avoided the cause of action in the Attorney General's information stated and that judgment of ouster from the franchises heretofore granted respondent in its articles of incorporation, by the State of Missouri, ought to be given to the State of Missouri for the nonuse of said franchises, notwithstanding its said answer, and it is therefore considered, ordered and adjudged by the Court that the said Delmar Jockey Club, respondent herein, has failed to show any good and lawful reason for the nonuse of the franchises granted to it by the State, as charged in the information of the State of Missouri by the Attorney General, and it is accordingly considered and adjudged that it be, and is hereby ousted of all the rights, franchises and privileges granted to it by the State in its articles of incorporation, and that it pay the costs of this proceeding and that said corporation be dissolved. It is further considered, ordered and adjudged that the President and Board of Directors of said Delmar Jockey Club, after satisfying the costs heretofore and herein adjudged, proceed at once to wind up and settle the affairs,
50 collect the outstanding debts and divide and distribute the moneys and other property of said Delmar Jockey Club among the stockholders after paying the debts due and owing by such company at the date of its dissolution, and do and perform all other duties devolving upon them as trustees therefor, as provided in section 976, R. S. of Missouri, 1899, and desist from all further exercise of any and all franchises heretofore granted to said Delmar Jockey Club by virtue of its incorporation under the laws of this State, from and after this day, and that execution issue therefor. (Opinion filed).

Which said opinion is in words and figures as follows, to-wit:

In the Supreme Court of Missouri.

In Banc, October Term, 1906.

(No. 13042.)

STATE OF MISSOURI *ex Inf.* HERBERT S. HADLEY, Attorney General, Informant,

vs.

DELMAR JOCKEY CLUB, a Corporation, Respondent.

On July 28th, 1905, Herbert S. Hadley, Attorney General, filed in this court his information, *ex officio*, in the nature of a *quo warranto* against the respondent corporation, the purpose of which is to divest said corporation of its franchises and forfeit its property to the State. To this information the respondent interposed a demurrer, which matter being in issue was submitted to this court and fully disposed of by an opinion by Burgess, J., not yet officially reported, but found in 92 S. W. p. 185, in which opinion the information is fully set out, and for that reason will not be incorporated herein.

After the disposition of the demurrer by the opinion aforesaid, the respondent filed answer as follows:

"Respondent, Delmar Jockey Club, comes by its attorneys and for its answer to the information of the Attorney General herein, admits that it is a corporation duly organized and incorporated under
51 the laws of the State of Missouri and denies each and every other allegation in said information alleged or contained.

Wherefore respondent prays that it be hence discharged with its costs.

II.

For its further answer to that portion of the information of the Attorney General herein, wherein it is alleged that respondent has failed to exercise certain franchises, claimed to be possessed by it, this respondent states that it has fully carried out and exercised all those provisions in its charter authorizing it to give exhibitions of agricultural products and exhibits of contests of speed and races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and has provided suitable fair grounds *of* the same, in this, that between the 18th day of January, 1901, and the 16th day of June, 1905, in pursuance of the provisions and requirements of Section 7419 to 7424, inclusive. Revised Statutes of Missouri, 1899, respondents duly paid large sums of money into the Treasury of the State of Missouri, to the credit of the State Fair Fund, the same being a fund created by Section 7424, Revised Statutes of Missouri, 1899, for the development and advancement of the industrial interests of this State under the direction of the State Board of Agriculture, and that all said moneys so paid

into said fund was received, used and appropriated by the State of Missouri, for the purpose of holding and giving annual exhibitions of agricultural products and stock of every kind and description at the City of Sedalia, Missouri, and that the said sums of money paid by respondent into the Treasury of the State of Missouri under the terms of Section 7419, to 7424, inclusive, were used and appropriated by the said State of Missouri and *if* said State Board of Agriculture solely for the maintenance and support of the said Missouri State Fair held annually at Sedalia, Missouri, and for the further purpose of providing, constructing, improving and equipping all grounds, stands and buildings necessary for the holding and giving of said fair.

52 Respondents further state that by exercising and receiving the said sums of money for the above mentioned purposes the said State of Missouri intended to and did accept the same as full and complete performance and use by respondents of its franchise to give exhibitions of agricultural products and stock and the said State of Missouri thereby intended to and did waive any other or further exercise of such franchise on the part of respondent.

Further answering the allegations of non-user from June 16th, 1905, to the date of the filing of this information, to-wit, July 28th, 1905, respondent states that the franchise of giving exhibitions of agricultural products and stock is not one which can be exercised continuously and at all times from the beginning to the end of the year, but is one, owing to its peculiar character, which can only be exercised during the harvest season of each year. For these reasons respondent was not required to exercise such franchise between the above specified dates, but respondent further avers that it has in good faith endeavored at all times to exercise the franchise granted to it by its article of incorporation in the manner and for the purposes intended by such grant, and that such is its purpose in the future, and respondent intends in every way to comply with and perform according to law all the obligations which it assumed upon the grant of the aforesaid franchises, to it by the State of Missouri, and respondent again specifically denies each and every charge allegation or assertion of a contrary purpose on its part, contained in the information filed herein.

Wherefore, respondent prays that it be hence discharged with its costs."

Upon the filing of this answer the Attorney General filed motion for judgment upon the pleadings, and the issues thus raised are the ones now for consideration and judgment by the court.

This motion is as follows:

"Comes now Herbert S. Hadley, Attorney General of the State of Missouri, who in this behalf prosecutes for the State, and

53 moves the court for judgment on the return and answer for respondent herein for the following reasons:

First. That said return and answer fails to state facts showing any sufficient cause or excuse for, or any legal defense to, the non-user of respondents franchises authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed or races

between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and for the establishing and maintaining of suitable fair grounds in the city and county of St. Louis, as set forth and charged in the information herein.

Second. It appears from the facts stated in said return and answer, and the second count thereof, that respondent is guilty of the acts of mis-user and abuser of its franchises charged in the information herein filed, in this, to-wit, that respondent engaged in the business of bookmaking and poolselling, registration of bets and the acceptance of bets in violation of the laws of this State:

Wherefore, informant prays that final judgment of ouster be rendered against the respondent as prayed for in the information in this case."

As a further part of the history of the case it might be said that the court sustained the motion for judgment and entered judgment of ouster and levied a fine of $5000.00 but filed no opinion.

This judgment of ouster was for both mis-user and non-user, and upon motion for rehearing was set aside, and said cause taken as submitted on the motion as above stated, and then assigned for opinion.

Points respectively urged by contending counsel will be duly noted in the course of our remarks.

I.

The first question is to determine the effect of respondent's answer. There is first a general denial. This without further pleading would raise the issue both as to the misuser and nonuser charged in the information. As to nonuser, the general denial first
54 pleaded, is followed by a plea, hereinabove fully set out, which amounts to a plea of confession and avoidance. This answer admits in effect, that it was the duty of the corporation to maintain fair grounds and hold an agricultural fair "in the City and County of St. Louis" as provided by its charter, the language of which charter is as follows:

"The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses and other awards and otherwise; to establish and maintain suitable fair grounds and a race track in the city and county of St. Louis with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track, public exhibitions of agricultural products and stock and of speed, or races, between horses for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto and to said grounds and track, to engage in pool selling, book making and registering bets on exhibitions of speed or races and the said race track and premises, as provided by law, and to let the right to others to do the same, to conduct restaurants, cafes, and other stands, for the sale of food and other

refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

It undertakes to avoid this admitted failure by saying that by reason of the requirements of Section 7419 to 7424 of the Revised Statutes, 1899, it had paid large sums of money into the State Treasury which was used to maintain a State Fair at Sedalia, Missouri. These sections of the Statutes constituted the old law providing for licensing poolselling and book making, and providing that the license fees should go to the State fair fund. Even before its repeal, this law, which is Art. II of Chapter 105, Statutes of 1899, in nowise excused the respondent from exercising the franchise granted
55 it to establish and maintain an agricultural fair. Whatever monies it paid the State under these sections of the law was license fees, belonging to the State, which could have been just as properly put in another fund by the Legislature, as into the State Fair fund. No money paid the State by reason of this law in anywise excuses the respondent for a failure to use the franchises granted to it. We thus have an admitted failure to exercise the principal and to the State and the public, the most beneficial one of all the rights granted it, and no legal excuse therefor. So that the motion for judgment upon the non-user should be sustained, unless it can be held that the general denial first pleaded, raises the issue, notwithstanding the later plea of confession and avoidance. This we think it does not do. The plea of general denial does not raise an issue where it is followed by a special plea of confession and avoidance. Price *v.* Mining Co., 83 M. A. l. c. 474; Bank of Monett *v.* Stone & Prickett, 93 M. A. l. c. 294.

In the Price case, Smith, P. J. said: "It is a rule of pleading that a general denial is overcome by a subsequent confession and attempted avoidance. McCord *v.* Railway, 21 Mo. App. 95.

It is a further rule that where a pleading is ambiguous it is to be taken most strongly in its interpretation against the pleader. The defenses pleaded by the answer are clearly inconsistent and should have been stricken out in the court below. (Darrett *v.* Donnelly, 38 Mo. 493 and Adams *v.* Trigg, 37 Mo. 142), but as they were allowed to stand without objection we must now regard the first, the denial as overcome by that of the subsequent confession and avoidance."

In the latter case, Bank of Monett *v.* Stone & Prickett, Broaddus, J., after a collation of the cases in this State, uses this language, which we approve: "We know of no rule of pleading which permits a party litigant to deny his adversary's allegations, and at the same time to confess and avoid them. At common law the rule required the pleader to admit his adversary's cause of action and then to allege matters by way of avoidance. Stephens Pleading, p. 90.
56 There is no question but what the answer is in violation of the common law rules of pleading, but it is also at variance with our code regulating the subject. Our courts, in passing on the question, have held such pleas to be defective. "A party cannot traverse and at the same time confess and avoid the same allegation." Coble *v.* McDaniel, 33 Mo. 363; Darrett *v.* Donnelly, 38 Mo. 492; Adams *v.*

Trigg, 37 Mo. 141; Atteberry *v.* Powell, 29 Mo. 429. In short, such a plea is subject to the objection of being inconsistent with itself, and also the charge of duplicity."

See also: McCord *v.* Doniphan Branch Ry. Co., 21 M. A. l. c. 95, and cases cited therein.

We conclude, that as to the charges of nonuser contained in the information, they stand as confessed under the pleadings and the question next for consideration is whether or not for this confessed dereliction ouster should go and if so to what extent. This question we consider next.

II.

Courts move cautiously in taking from corporations their charter grant of franchises. No insignificant act of either misuser or nonuser will suffice for the exercise of the power vested in the courts, but the courts can and will forfeit all the franchises of a corporation for either misuser or nonuser if the acts or omissions are sufficiently great. In fact it may be said that forfeiture may be declared upon either of three grounds: (1) wilful nonfeasance or nonuser, (2) wilful misfeasance or misuser, (3) usurpation of powers not granted. 10 Cyc. p. 1280.

Justice Story of the U. S. Supreme Court at an early day announced the doctrine thus: "A private corporation created by the Legislature may lose its franchises by a misuser or *nonuser* of them; and they may be resumed by the Government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation." Teret *et al.. v.* Taylor, *et al.* 9 Cranch, l. c. 51.

57 Lewis, C. J., Supreme Court of Pennsylvania, in case of Commonwealth *v.* Bank, 28 Pa. St. l. c. 389, uses this language: "It may be affirmed as a general principle, that where there has been a misuser, or a *nonuser*, in regard to matters which are of the essence of the contract between the corporation and the State, and the acts of *omissions* complained of have been repeated and wilful, they constitute a good ground of forfeiture."

The Supreme Court of Mississippi, says: "The acts of misuser or *nonuser* must be touching matters which are of the essence of the contract between the sovereign and the corporation, and they must be wilful and repeated."

Atty. Genl. *v.* Ry. Co. 51 Miss. l. c. 608.

In Iowa, the doctrine is thus stated: "A failure to substantially comply with the express provisions or conditions of the articles and of the general laws, or a wilful misuse or *nonuse* in regard to matters which go to the essence of the contract between the corporation and the State, are acts and *omissions* which amount to forfeiture. Ang. & A. Corp., section 774; Boone Corp., section 203; Mor. Priv. Corp., 1014; Tayl. Corp., section 457; Wat. Corp., section 427; Ins. Co. *v.* Needles, 113 U. SS. 547, 5 Sup. Ct. Rep. 681; State *v.* Minnesota Central Ry Co., 36 Minn. 246, 30 N.W. Rep. 816; State *v.* Council Bluffs &

N. Ferry Co., 11 Neb. 354; 9 N. W. Rep. 563; State *v.* Farmers Col. lege, 32 Ohio St. 487. Courts act with extreme caution in proceedings like this, and forfeitures will not be declared, except under the express provisions of the charter, or for a plain misuse or *nonuse* of powers, by which the corporation fails to fulfill the design and purpose of its organization. State *v.* Farmers College, *supra;* State *v.* Commercial Bank, 10 Ohio St. 535; Harris *v.* Ry. Co., 51 Miss. 602; Ry. Co. *v.* People, 73 Ill. 541; State *v.* Real Estate Bank, 5 Ark. 595; State *v.* Societe Republicaine, 9 Mo. App. 114. It is only such acts of omissions as concern matters which are of the essence of the contract between the State and the corporation, or in other words,
58 in which the public has an interest, that are causes of forfeiture. Commercial Bank *v.* State, 6 Smedes & M. 599; Attorney General *v.* Petersburg & R. Ry. Co. 6 Ired § 456; Harris *v.* Ry. Co. 51 Miss., 602; State *v.* Council Bluff & N. Ferry Co., *supra;* Thompson *v.* People, 23 Wend. 193; State *v.* Real Estate Bank, *supra;* State *v.* Minnesota Central Ry. Co. *supra.*"

In addition to the cases quoted from, and the cases cited in the quotations, many others along the same line could be cited. Suffice it to say that the courts hold, and rightfully, that where there is either wilful misuse or wilful nonuse of the franchise or franchises, which are of the essence of the contract with the State, and those in which the State or public is most interested then a forfeiture of the whole charter should be and will be declared. When a corporation receives from the State a charter granting certain franchises or rights, there is at least an implied or tacit agreement that it will use the franchises thus granted; that it will use no others, and that it will not misuse those granted. A failure in any substantial particular entitled the State to come in and claim her own, the rights ther-tofore granted, and this through a judgment of forfeiture in a proceeding like the one at bar.

The right to construct and maintain suitable fair grounds in the City and County of St. Louis, and to give exhibitions of agricultural products thereat, is one of the essence- of this contract between the State and the respondent. It was and is the franchises in the exercise of which, the State and general public have the most interest and concern. A failure to exercise this franchise was a failure to perform the very thing which was of the essence of the contract. That this failure was wi-ful is shown by the length of time of the admitted nonuser as well as by other things made apparent by the pleadings. So far as the State and general public are concerned this right or franchise, so long neglected, was leading and uppermost, in interest. No legal excuse is offered for respondent's failure. It would appear, at least by inferences deducible from the pleadings, that respondent was alert in promoting that
59 incidental feature of its charter, gambling upon horse races, and furnishing its gamblers with refreshments, both liquid and solid, but extremely indifferent as to doing the things, moral in character, which it had, by receiving its charter, tacitly agreed to do, and the only things in which the State and public had any special interest.

Such a flagrant and wilful nonuser of franchises, which are of the very essence of the grant, demand, in our judgment, the forfeiture of all the rights and franchises granted, and we therefore hold that there shall be a judgment decreeing a forfeiture of all the rights and franchises granted to respondent by its charter and a dissolution of said corporation.

III.

We reach now the interesting proposition of this case, and that is whether or not, in addition to ousting respondent from its franchises, we can and should appropriate a part of its substance to the use and benefit of the State.

The State often grants to corporations many rights which inure largely to the benefit of the corporation and not to the benefit of the State, but with the sweet a tinge of bitter is usually found in the shape of some important right or franchise, the exercise of which by the corporation does redound to the benefit of the State. This benefit is a consideration for the grant of the other rights largely beneficial to the corporation. In our previous proposition we do not hold that a forfeiture should follow the mere nonuser of such rights and franchises as inure largely to the interest of the corporation and are of no special interest to the public, but we do hold that if the franchise or right not used is the principal one in which the State is interested, and is of the very essence of the contract, and there is wilful nonuser, then a forfeiture should be declared. Then in addition to a judgment of ouster, what, if anything further, should be done. It is urged by respondent that for mere nonuser no fine or taking of property can be added to the judgment of ouster. In our opinion it makes no difference upon what
60 ground the ouster is placed, whether misuser, nonuser or usurpation of rights. These proceedings are no longer recognized as criminal proceedings and have not been so recognized since the early days of the common law, but we have continually imposed what are called fines, a term no doubt coming down from the time when the proceeding was looked upon as a criminal proceeding. The implied contract with the State, when the charter was given respondent, was that it would exercise and use the granted rights; that it would use none other, or stated otherwise that it would not usurp other rights; that it would rightfully use the powers granted and not misuse them. A wilful failure of either of these covenants with the State will authorize a forfeiture, and why not a fine? We forfeit for nonuser, and why? Because there has been a failure to perform the obligations to the State. Because there has been a violation of the contract with the State. Misuser is likewise a violation of the implied agreement with the State. So is usurpation. Each are but violations of the implied contract with the State and for these violations we declare forfeitures, why not fix penalties and punishments in the one as in the other. The gist of each in *quo warranto* is the wilful violation of the rights of the State under the implied contract, and not the violation of some criminal law, for we do not try criminal cases and affix criminal punish-

ments in *quo warranto* proceedings. The violation of a corporation's contract with the State by misuser or usurpation may be evidenced by the fact of the violation of some statute, criminal in character, but in this kind of proceeding we try the right of the corporation to further hold its franchises, not the question of finding its guilt or innocence under the statute and fixing punishment permitted by the statute. It is the only way the State has of preventing the abuse of the confidences it has reposed in these corporate creatures which are of its own making. This abuse may be by nonuser, misuser or usurpation, but in our judgment, the State has the same rights in each event, both as to the forfeiture and the fine.

In the case at bar, the conditions presented practically
61 amount to a misuser. Here the State granted several powers to respondent, but with the central thought and purpose of procuring an agricultural fair. As an inducement and to encourage respondent in so doing, other powers are given which inure to the financial benefit of the corporation. The maintenance of an agricultural fair we know often proves a financial loss. Here we have the respondent sorting out the bitter from the sweet—exercising those powers which inure to its own benefit and wilfully neglecting those in the interest of the public. This wilful conduct, considering the powers granted as a whole, with the central purpose in that whole, to construct fair grounds and buildings, and maintain an agricultural fair, might be said to even be a misuser of its powers and franchises—and such a misuser as would authorize both fine and forfeiture.

But returning to the question of nonuser, pure and simple, the overwhelming weight of authority is to the effect that the court can forfeit the franchise for nonuser. Forfeiture is but taking from the corporation, its property, its corporate rights which are a part of its property. Forfeiture is not only the taking of property, but it is further punishment by putting to death the corporation itself. If we can take one class of the corporation's property for mere nonuser, why not another? This respondent claims that the rights and franchises granted, and which it is exercising are valuable. If we can take them for nonuser, why can't we go further and say that we will not only punish you by forfeiture of all these valuable rights, which you hold as your property, and by putting you to death by dissolution, but we will, because of the wilful wrong to the State, take from your gains a further portion of your property? We see no distinction. The character of the judgment is within the discretion of the court. The doctrine is announced broadly in 10 Cyc. p. 1279, as follows:

"It may be collected from a comparison of a number of decisions speaking upon that question that, although the grounds of
62 forfeiture have been clearly made out, yet the question of imposing the severe penalty of the law is committed to judicial discretion so far as mitigation is concerned, unless a judgment of ouster is commanded by a statute in such terms as leaves the court no discretion."

And in High's Extraordinary Legal Remedies, p. 702, Sec. 758, as follows:

"The propriety of imposing a fine in addition to a judgment of ouster is regarded as a matter of sound judicial discretion, and when no improper motives are alleged or shown against the party ousted, the fine imposed will be merely nominal."

Our own court through Marshall, J., in case of State *ex inf. v.* Armour Packing Co., 173 Mo. l. c. 392, said:

"This leaves only the question of punishment. The punishment to be imposed rests in the sound judicial discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular act complained of (State *ex inf. v.* Lincoln Trust Co. 144 Mo. 562; State *ex rel. v.* Gas and Oil Co., 153 Ind. 483; State *ex rel. v.* Railroad, 47 Ohio St. 130; State *ex rel. v.* Standard Oil Co. 49 Ohio St. 137; Yore *v.* Superior Court, 108 Cal. 431; State *v.* Turnpike Co. 10 Conn. 167; State *ex rel. v.* Topeka, 30 Kas. 653; People *v.* Railroad, 15 Wend. 113; Comommwealth *v.* Canal Co. 43 Pa. St. 301) or it may be a suspensive judgment of ouster with a fine accompaniment (State *ex inf. v.* Ins. Co. 152 Mo. 1) or it may be a simple fine, if it appears that the trust, pool or conspiracy complained of and proved, has ben abandoned. In short the character of the judgment rests in the discretion of the court. (5 Thompson on Corp. sec. 6812; Westin *v.* Lane, 40 Kas. 479; State *ex rel. v.* Railroad, 91 Iowa, 517; State *ex inf. v.* Bernoudy, 36 Mo. l. c. 281.)"

In the Packing Company case, *supra*, it is true the implied contract with the State was violated by misuser of powers granted, but the penalty fixed, $5,000.00, was not under section 8968, the
63 quasi criminal section of the law, but under the broad right of the court to control the creatures of the State by taking their property from them, whether it be their franchises or other kinds of property.

In fact, Judge Marshall, on page 380 of 173 Mo., in the Packing Company case, expressly says that the fines and penalties fixed by the statutes, at least quasi criminal, if not criminal are not considered in the case. His language is: "Other penalties and forfeitures are imposed by section 8968, but are not involved in or sought to be enforced in this proceeding."

What is true of this case is true of other cases where the court in its discretion has by its judgment forfeited to the State a part of the property of the corporation. Without lengthening an argumentative opinion, already too long, we conclude that this court has the right to add to its judgment of ouster and dissolution, what is usually termed a fine; that the fine heretofore originally fixed, $5,000.00, is not an unreasonable one; that the judgment of this court should and will be to the effect that respondent is ousted of all of its charter rights and the same forfeited to the State; that out of its property it pay to the State the sum of Five Thousand Dollars, together with the costs of this action, and that said corporation be dissolved and it is so ordered.

IV.

Upon a reading and consideration of the foregoing opinion written by Graves, J., Valliant, and Lamm, J. J. concur in toto. Fox, J. concurs in the second paragraph or proposition thereof, and expresses no opinion as to the first paragraph or proposition but dissents from the third paragraph. Brace, C. J. and Gantt and Burgess, J. J. concur in the opinion except as to the third paragraph thereof.

It therefore follows that by the opinion of the majority of this court that the respondent should be ousted of all of its franchises and charter grants and that the same be forfeited to the State, the corporation dissolved but that no further fine or punishment
64 be inflicted, and that the judgment of the court go to that effect and that respondent pay the costs. It is accordingly so ordered.

W. W. GRAVES, *J.*

And afterwards, to-wit, on the 29th day of November, 1906, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

Comes now the said respondent by attorney, and files its motion for a rehearing herein.

Which said motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of Missouri.

Court en Banc, October Term, 1906.

STATE *ex Rel.* ATTORNEY GENERAL
vs.
DELMAR JOCKEY CLUB.

Motion for Rehearing.

Respondent respectfully moves the court for a rehearing in the above cause for the following reasons:

I.

The Court misinterpreted the nature and character of the
65 various franchises granted by the State of Missouri to respondent, which are set forth in its charter of incorporation, in this:

A. The court overlooked the fact that the permission given respondent to make agricultural exhibits was not of the *essence* of its contract with the State, but was simply a subsidiary franchise upon

the exercise of which respondent's right to be a corporation was not made to depend.

B. The court overlooked the fact shown, by the record in this case and by matters within its judicial knowledge, that the particular franchise granted to respondent and upon which its right to be a corporation depended, was the franchise of conducting under the law then in force racing meets and giving exhibition of horse racing for purses or prizes and otherwise as contemplated by the act providing for a State Fair Fund, and being Article II, Chapter 105, Section 7419 to 7425 inclusive of the Revised Statutes of Missouri of 1899.

C. The Court overlooked the fact that the above quoted sections of the Statute, which were substantially in existence at the time of respondent's incorporation, and the title of respondent as a corporation, and the purposes set forth in respondent's charter, and the facts within the judicial knowledge of the court that the statutes in question were enacted for the specific purpose of enabling corporations and persons to engage in the business defined in them for pecuniary profit, demonstrate that the particular charter taken by respondent was for the purpose of conducting the business contemplated by such statutes.

II.

The opinion of the court overlooked the fact, patent on the face of the information of the Attorney General in this cause, that it was the purpose of said proceeding to destroy the charter of respondent for alleged criminal practices, and that except upon the assumption that respondent and its officers had been and were engaged in such alleged criminal practices, this proceeding would not have been instituted.

66 All of which is shown by the record in this case and by this court's knowledge of the positions taken on the oral argument and briefs heretofore filed, and by the necessary construction which the court is bound to put upon the allegations of the information filed herein.

III.

Because the court has misapprehended the effect in law of the answer filed by respondent in this cause.

A. In this. That the second defense of the answer does not confess omission by respondent to exercise the right to give fairs, for the second defense of respondent's answer simply pleads estoppel, and neither at common law nor under the code, can a plea of estoppel be confounded with a plea of confession and avoidance.

B. Because the court in its opinion in discussing the plea of estoppel, states: that the large sums derived by the State for licenses from the conduct of races by respondents and other corporations constituted revenue which the State might divert from the State Fair for whose support such licenses were collected by the State. This statement in the opinion shows the court overlooked Section 7424 of the Revised Statutes of Missouri of 1899 which specifically creates a State Fair Fund out of the proceeds of such licenses. The statement of the opinion further overlooks the fact that such licenses

have been uniformly turned over to said State Fair in accordance with said Section of the Statute (7424) and the receipts thereof have been acknowledged in the biennial reports of the State Board of Agriculture made in pursuance with section 7418 of said Statute.

IV.

The opinion in this case overlooked the fact that the information filed by the Attorney General if it could be construed as stating any ground of forfeiture for mere nonuser of a subordinate and incidental franchise to give fairs is fatally defective in this, that it attempted to conjoin such ground of forfeiture with the real
67 and substantial grounds of forfeiture set out in said information on account of the alleged criminal practices of respondent, and the opinion overlooks the fact that neither at common law nor under the code procedure could there be such a conjunction of different causes of action in the same court, and the opinion overlooks the further fact that the motion for judgment being in legal effect a mere demurrer must for that reason be denied, because a demurrer is a general fault finder and runs back to the first defect in the proceedings, and in this case seizes upon the illegal joinder of causes of action in the same court of the information.

V.

Under the Court's decision, respondent would be deprived of its property without a trial of the issues, and without due process of law.

Respectfully submitted,

HENRY W. BOND,
THOMAS BOND,
Attorneys for Respondent.

Copy of the above motion received this, the 29th day of November, 1906.

HERBERT S. HADLEY,
Attorney General.
JOHN KENNISH,
Ass't Att'y Gen'l.

And afterwards, to-wit, on the 18th day of December, 1906, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* ATT'Y GEN., Inf.,
v.
DELMAR JOCKEY CLUB, Resp.

68 Now at this day, the court having fully considered and understood the motion heretofore filed for rehearing here-, doth order that said motion be, and the same is hereby overruled.

And afterwards, to-wit, on the 3rd day of January, 1907, the further following proceedings were had in said cause, viz:

STATE *ex Inf.* H. S. HADLEY, Att'y Gen., Informant,
vs.
DELMAR JOCKEY CLUB, Respondent.

Now at this day, there is presented to the Honorable James B. Gantt, Chief Justice of the Supreme Court of the State of Missouri, in chambers, a writ of error to the Supreme Court of the United States; a citation directed to said informant, citing and admonishing him to appear at a Supreme Court of the United States on the 2nd day of February, 1907; an assignment of errors and a bond in the sum of Five hundred dollars; which said writ of error is allowed, said citation signed, said assignment of errors filed and said bond approved, ordered filed and made a part of the record herein.

Which said assignment of error- *is* in words and figures as follows, to-wit:

In the Supreme Court of Missouri, October Term, 1906.

No. 13042.

STATE OF MISSOURI on the Information of HERBERT S. HADLEY, Attorney General, Relator,
vs.
DELMAR JOCKEY CLUB (a Corporation), Respondent.

69 *Assignments of Error.*

Now comes Delmar Jockey Club, respondent herein and for the purpose of becoming plaintiff in error in this cause from the Supreme Court of Missouri to the Supreme Court of the United States assigns errors in the judgment of said Supreme Court of Missouri and says, that in the record and proceedings in this cause wherein the Supreme Court of Missouri has rendered its judgment ousting said Delmar Jockey Club of its franchises and corporate existence and thereafter overruling a motion filed by said Delmar Jockey Club for a rehearing of the judgment heretofore rendered against it, there was manifest error to the prejudice of said Delmar Jockey Club in its rights under the Constitution of the United States duly set up and claimed by it in said cause as will appear from the record therein as follows:

First. The Delmar Jockey Club, respondent herein, is a corporation duly organized and incorporated under the laws of the State of Missouri governing the organization and incorporation of manufacturing and business corporations, and as such was incorporated by the State of Missouri for the principal purpose of engaging in the business of holding racing meetings and aiding the State of Missouri in car-ying out the purposes and objects set forth in Chapter 105, Articles 1 and 2, Sections 7405, 7424 inclusive of the Revised Statutes of the State of Missouri; that said corporation was also granted in its charter other incidental or permissive franchises. That at the time of the incorporation of Respondent the Statutes of

the State of Missouri provided for a large revenue to the State to be derived from the racing business which respondent was authorized to engage in by its said charter, which revenue said statutes further provided should constitute a State Fair Fund to be used for the support and maintenance of a State Fair to be held annually at a place to be selected by the State Board of Agriculture and which was subsequently located at Sedalia, Missouri; that the Statutes and Acts thus referred to were known as the Breeder's Bill or
70 State Fair Fund Law. That at all times from the date of its incorporation until the 16th of June 1905 (when said Breeder's Bill was repealed by the Legislature of Missouri) Respondent fully exercised its franchise to hold racing meetings and conducted and operated the same in the County of St. Louis and State of Missouri. That during the whole of said period the State of Missouri co-operated with Respondent in the exercise of its said chartered franchises by issuing licenses therefor under the terms of said Statutes and exacting and receiving from Respondent the sums paid to the State under said Breeder's Law and appropriating the same to the support of the State Fair at Sedalia, Missouri.

Respondent states that at no time during the existence of said Breeder's Law and during the co-operation of the State in the exercise by Respondent of its franchise according to said Statutes, did the State of Missouri or any of its officers or any citizen or representative of the public complain that Respondent had not also exercised its incidental or permissive franchise to give local Fairs, notwithstanding which Respondent states that immediately after the repeal of said Breeder's Law the Attorney General of the State of his own motion instituted the present proceeding against Respondent in the Supreme Court of Missouri for the express purpose of totally destroying its charter for the alleged misuser and abuser of its principal franchise to conduct racing meetings and for the alleged nonuser of its permissive right or franchise to give local Fairs in the County of St. Louis.

Respondent alleges that such proceedings were had in the Honorable Supreme Court of Missouri after the consideration of demurrers filed to said suit of the Attorney General, and also answers thereto, as resulted in a judgment of said Court totally destroying all the franchises and the corporate life of Respondent upon the sole ground of an inferred or assumed nonuser by it of its permissive right to give local Fairs in the County of St. Louis during the existence of the aforesaid Breeder's Law and during the time which in pursuance of the provisions of said law Respondent and the State of Mis-
71 souri did co-operate together as aforesaid in the exercise of plaintiff's franchises to give racing meetings under the provisions of said Breeder's law.

Respondent assigns said judgment of the Supreme Court of Missouri as error and in violation of its rights under the Constitution of the United States in this.

First. That in and by the said judgment of said Supreme Court an unjust and unequal enforcement of the Breeder's Law is worked and brought about against Respondent in error in that by the effect

of said judgment and decision of the Supreme Court the said Respondent is made to suffer a forfeiture of its charter and a destruction of its property for assumed or inferred acts of nonuser of a permissive and ancillary grant in its charter during a period of time wherein the said State of Missouri by its own act and in full co-nizance of the acts and doings of Respondent under its said charter [illegible] co-operated in the exercise of the principal grant contained in said charter and estopped itself by such act and by taking the profits of such co-operation, from inquiring any further as the non-exercise of any subsidiary right or franchise granted in said charter.

Second. That in and by said judgment and decision of said Supreme Court the said act repealing the aforesaid Breeder's Law is made to have retrospective operation and effect in that it is made the basis of a judgment depriving plaintiff in error of its corporate life and property for assumed or inferred nonuser of a permissive franchise granted to plaintiff in error during the time said Breeder's law was in full force and effect, thereby impairing the contract between the State and plaintiff in error entered into and made by the terms and provisions of the articles of incorporation granted to Respondent, and which contract though lawfully performed was by said judgment thereafter impaired and annulled and respondent was deprived of its property without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

72 Third. That upon the face of said proceeding existing in said Supreme Court of Missouri at the time of its final decision herein, and at the time of the overruling of the motion for rehearing filed herein, it is apparent that the property and corporate rights of Respondent in error were taken from it without due process of law and against the law of the land, in this, that the inferred nonuser upon which the said court based its judgment was traversed and denied and further shown to be a matter which the State was estopped to inquire into by the averments and allegations of the pleadings filed by Respondent, notwithstanding which and without any trial of the issues thus tendered, said judgment and decision depriving Respondent of its property and corporate rights was rendered against the law of the Land.

Respondent further assigns error in the judgment of the said Supreme Court of Missouri in this, that *quo warranto* will not lie to compel the observance of a criminal statute or to punish its violation and the information filed herein by the Attorney General of the State of Missouri in so far as it seeks to oust the Delmar Jockey Club of its franchises for the alleged violation of a criminal statute of the State of Missouri, does not state a cause of action, and any judgment rendered upon such an information is a denial of the right of trial by jury in violation of Article VI of the Amendments to the Constitution of the United States, and is a deprivation of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

Respondent further assigns error in the judgment of the said Supreme Court of Missouri in this, that the information neither

charges nor alleges that any of the officers or agents of said corporation have been prosecuted under indictment or upon verified information for the felonies charged therein, and have been after trial found guilty thereof, but prays the Supreme Court of Missouri to convict certain persons of the felonies charged in said information without the intervention of constitutional methods, and in a
73 manner unknown to the law of the land, and the judgment of the Supreme Court of Missouri rendered in such a proceeding upon such an information amounts to a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Respondent further assigns error in the judgment of the said Supreme Court of Missouri in this, that the judgment of the Supreme Court of Missouri deprives the stockholders of the Delmar Jockey Club of their property without due process of law, and without due conviction of any of the agents and officers of said corporation, of any of the felonies charged in the information, in violation of the 14th Amendment to the Constitution of the United States.

Respondent, Delmar Jockey Club, presents the foregoing assignments of error in order that it may appear of record in this cause that it is entitled to a reversal and an annulment of said order and decree of the Supreme Court of Missouri, and to obtain right and justice in the premises, and to that end, that a writ of error to the Supreme Court of the United States may be granted to Respondent.

Respectfully submitted,

HENRY W. BOND,
THOMAS BOND,
Attorneys for Plaintiff in Error.

And which said bond is in words and figures as follows, to-wit:

STATE *ex Informatione* ATTORNEY GENERAL
vs.
DELMAR JOCKEY CLUB.

Supersedeas Bond.

Know all men by these presents That we, Delmar Jockey Club, a corporation, as Principal and Louis A. Cella and C. A. Tilles as sureties are held and firmly bound unto the State of Missouri
74 in the full and just sum of Five Hundred Dollars to be paid to the said State of Missouri as aforesaid to which payment well and truly to be made we bind ourselves, heirs, successors, executors and administrators jointly and severally by these presents, sealed with our seals and dated this —— day of January in the year of our Lord, 1907.

Whereas, lately at the October Term A. D. 1906 of the Supreme Court of Missouri in a suit depending in said court between the State of Missouri on the information of Herbert S. Hadley, Attorney General, Relator, against Delmar Jockey Club, a corporation, Respondent, judgment was rendered against the respondent and the said

respondent having obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said defendants, citing and admonishing them to be and appear at the Supreme Court of the United States to be held at Washington, D. C. not exceeding 30 days from and after the date of the citation in said cause.

Now, therefore, the condition of the above obligation is such that if the said Delmar Jockey Club shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea then the above obligation to be void else to remain in full force and virtue. And the approval of this bond to act as a supersedeas of the judgment heretofore rendered by the Supreme Court of Missouri in the above entitled cause.

DELMAR JOCKEY CLUB,
By JOSEPH E. MARTIN, *Secretary.*
LOUIS A. CELLA. [SEAL.]
C. A. TILLES. [SEAL.]

Approved by
JAMES B. GANTT,
Chief Justice of the Supreme Court of Missouri.

75 STATE OF MISSOURI, *set:*

I, John R. Green, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete copy of the proceedings in the cause where- the State of Missouri, *ex informatione*, Attorney General, is informant and the Delmar Jockey Club is respondent, as fully as the same remains of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and the seal of said court hereto affixed. Done at office in the City of Jefferson, this 7th day of January, 1907.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No. 20,556. Missouri supreme court. Term No. 219. Delmar Jockey Club, plaintiff in error, *vs.* State of Missouri on the relation of the Attorney General. Filed February 1st, 1907. File No. 20,556.

No. 219.

FILED
APR 5
JAMES H. McK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

DELMAR JOCKEY CLUB, A CORPORATION, Plaintiff in Error,

vs.

THE STATE OF MISSOURI, Defendant in Error.

MOTION TO DISMISS AND AFFIRM, WITH BRIEF AND ARGUMENT IN SUPPORT THEREOF.

HERBERT S. HADLEY, Att'y-General,
JOHN KENNISH, Ass't Att'y-General.
For Defendant in Error.

THE HUGH STEPHENS PRTG. CO., JEFFERSON CITY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

DELMAR JOCKEY CLUB, A CORPORATION, Plaintiff in Error,

vs.

THE STATE OF MISSOURI, Defendant in Error.

MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION TO HEAR AND DETERMINE THE SAME, AND TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF MISSOURI.

And now comes the State of Missouri, Defendant in Error in the above entitled cause, by its counsel, Herbert S. Hadley, Attorney-General of the State of Missouri, and respectfully moves the Court to dismiss the writ of error heretofore granted and issued in said cause for the following reasons, to wit:

First. Because it is apparent from the record here presented in said cause that no Federal question was involved in the pleadings, trial, proceedings and determination of said cause in the Supreme Court of the State of Missouri.

Second. Because it is apparent upon the record that no Federal question was presented to the Supreme Court of the State of Missouri for determination in said cause.

Third. Because it is apparent from the record that no decision of any Federal question was necessarily involved in the rulings, findings, opinions, judgments and decrees of the Supreme Court of Missouri in said cause.

Fourth. Because it is apparent from the record in said cause that neither the validity of any treaty or statute or any authority exercised under the United States, was in any wise drawn in question in said cause, and there was no decision or judgment against the validity of such treaty, statute or authority.

Fifth. Because it is apparent from the record that neither the validity of any statute of the State of Missouri, or of any authority exercised by or under the State of Missouri, was drawn in question in said cause on the ground of being repugnant to the Constitution, treaties or laws of the United States, and there was no decision or judgment in said cause in favor of any such validity.

Sixth. Because it is apparent from the record that in the pleadings, rulings, findings, opinions, judgments and decrees of the Supreme Court of the State of Missouri in said cause there is no decision against any title, right, privilege or immunity specially set up or claimed by the plaintiff in error under the Constitution or any treaty, statute of or commission held or authority exercised under the Constitution of the United States.

The defendant in error, in case the writ of error shall not be dismissed, moves the Court to affirm the judgment of the Supreme Court of the State of Missouri, for the reason that although, in the opinion of the Court, the record may show that this court has jurisdiction, it is manifest that the said writ of error was taken for delay only, and that the question upon which the jurisdiction depends is so frivolous as not to need further argument.

Respectfully submitted,

HERBERT S. HADLEY, Att'y-General,

JOHN KENNISH, Ass't Att'y-General.

.....

Of Counsel.

For Defendant in Error.

STATEMENT.

At the April term, 1905, of the Supreme Court of the State of Missouri, this cause was instituted by the Attorney-General of said State, by filing in said court ex-officio, against the plaintiff in error, a corporation, an information in the nature of a quo warranto. It was alleged in the information that the plaintiff in error was organized as a corporation under the laws of the State of Missouri, on the 18th day of January, 1901, with a capital stock of one hundred thousand dollars, and for the following purposes, as set forth in its articles of association, to wit:

> "The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of argicultural products and exhibitions of contests of speed and races between horses, for premiums, purses and other awards and otherwise; to establish and maintain suitable fair grounds and race track, public exhibitions of agricultural products and stock, and of speed, or races, between horses, for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto, and to said grounds and track; to engage in pool-selling, bookmaking and registering bets on exhibitions of speed or races at the said race track and premises, as

> provided by law, and to let the right to others to do the same; to conduct restaurants, cafes and other stands, for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

The information charged the plaintiff in error with wilful misuser and non-user of its corporate franchises, and prayed that the said corporation be ousted of its franchise and corporate privileges, that the same be declared forfeited, and that all its property be declared forfeited to the State.

Plaintiff in error filed a demurrer to the information containing nine separate grounds, the first of which was as follows:

> "1. That the portion which relates to acts of bookmaking, poolselling and registration of bets described as the business carried on by the respondent from January 18, 1901, to June 16, 1905, does not state violations of law, because such acts were lawful, there being no averment that the defendant was not licensed to do such acts."

The demurrer was sustained as to the first ground thereof, but overruled as to all of the other grounds, and the Court ordered the plaintiff in error to plead over within fifteen days, and that failing to do so, judgment be entered ousting it of all its franchises. Thereafter, and within the time allowed by the Court, plaintiff in error filed an answer to the information, which answer consisted of a general denial, and a second defense in the nature of a plea of confession and avoidance. There-

upon, the defendant in eror filed a motion for judgment on the pleadings on the ground that the facts pleaded in the second defense of the answer amounted to a confession of the acts of mis-user and non-user charged in the information. Upon the hearing and argument, the Court sustained the motion and entered judgment of ouster and a fine of five thousand dollars against plaintiff in error, on the grounds of non-use, mis-use and perversion of its corporate franchises. Plaintiff in error filed a motion for a rehearing, which motion was sustained by the Court. Upon a reconsideration of the cause, a motion for judgment on the pleadings was again sustained upon the ground of non-user of its corporate franchises, and a judgment was rendered ousting plaintiff in error of all of its franchises and charter grants, and adjudging that the same be forfeited to the State and the corporation dissolved. In the latter judgment, no fine was imposed by the Court. A motion for a rehearing was filed and overruled, and plaintiff in error brings the cause to this court by a writ of error to review that judgment.

No Federal question was presented in the information or sought to be raised in the answer, or in the motion for judgment on the pleadings. Neither was there a Federal question decided or referred to in the opinion of the Court in passing on the demurrer or in final decision declaring the judgment of the Court. In the motion for rehearing filed by the plaintiff in error after the first judgment of ouster certain Federal questions were sought to be raised, but that motion was sustained and the rehearing granted as prayed therein. After the final judgment of ouster was rendered, to review which the writ of error herein was sued out, a motion for rehearing was filed by the plaintiff in error setting forth several grounds therefor, but in none of which was a Federal question raised or pre-

sented, unless in the fifth and last ground, which was as follows:

> "Under the Court's decision, respondent would be deprived of its property without a trial of the issues and without due process of law."

The defendant in error contends that no Federal question is presented by the record in this case and that, therefore, this court is without jurisdiction to review the judgment of the Supreme Court of the State.

BRIEF AND ARGUMENT.

The law as to the necessity of raising a Federal question in a State court and as to the manner in which it must be raised, is so clear that it is unnecessary to engage in an extensive review of the authorities in support of the motion to dismiss this writ of error. It is manifest that the first motion for rehearing cannot be considered in this case for the reason that that motion was by the court sustained and another and different judgment rendered on the second hearing and consideration of the case by the Supreme Court of Missouri. The only question raised in the second motion for rehearing which relates remotely or in the slightest degree to a Federal question, is the fifth or last ground under which it is claimed that "under the court's decision the respondent would be deprived of its property without a trial of the issues and without due process of law." As the Constitution of the State of Missouri, Section 30, article 2, provides that "no one shall be deprived of life, liberty or property without due process of law," it must be presumed that the plaintiff in error intended to raise a question under the Constitution of the State of Missouri and not under the Constitution of the United States.

Peter v. Foley, 24 How. 420, 16 Law. Ed. 740.

This Court has uniformly held that it will not attempt to revise the judgment of a Supreme Court of a state respecting an interpretation of its own Constitution, and an assignment of error based upon such contention

raises no question which this Court has jurisdiction to review.

Jackson vs. Lamphire, 3 Pet., 280.
Pittsburg Ry. Co. vs. Backus, 154 U. S. 425.
Murray vs. Louisiana, 163 U. S. 101.
Missouri vs. Harris, 144 U. S. 210.

And it is further thoroughly established by the decisions of this court that where a Federal right, title, privilege or immunity is asserted, it must be specially set up or claimed in the State court to give this Court jurisdiction, and the section of the Constitution of the United States under which it is claimed some right, title, privilege or immunity is violated, must be called to the attention of the Court.

Farney vs. Towle, 66 U. S. 351.
O'Neil vs. Vermont, 144 U. S. l. c. 335.
Maxwell vs. Newbold, 18 How. 511.
Brooks vs. Missouri, 124 U. S. 344.
Spies vs. Illinois, 123 U. S. 131.
Leeper vs. Texas, 139 U. S. 462.

In the case of Sayward vs. Denny, 158 U. S. 180, this Court clearly and tersely declared the law as to the manner in which a Federal question must be raised to make it subject to review in this court:

> "As the validity of no treaty or statute of, or authority exercised under the United States, nor of a statute of, or authority exercised under, any state, was drawn in question, it is essential to the maintenance of our jurisdiction that it

should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the state in which such decision could be had was against the title, right, privilege or immunity so set up or claimed, and in that regard certain propositions must be regarded as settled:

'(1) That the certificate of the presiding judge of the state court as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

'(2) That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way.

'(3) That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment.

'(4) That the petition for the writ of error forms no part of the record upon which action is taken here.

'(5) Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule.

'(6) The right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed.

'(7) Or, at all events, it must appear from the record by clear and necessary intendment that the Federal question was directly involved,

> so that the state court could not have given judgment without deciding it; that is, a definite issue as to the decision of the right must be distinctly deducible by the record before the state court can be held to have disposed of such Federal question by its decision.' "

This declaration was recently affirmed in the case of Erie R. R. Co. vs. Purdy, 185 U. S. 154.

In view of these decisions, we respectfully submit that the writ of error should be dismissed or the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,
HERBERT S. HADLEY, Att'y-General,
JOHN KENNISH, Ass't Att'y-General.

.....

Of Counsel.
For Defendant in Error.

Office Supre
F'I
APR
JAMES H.

219.

No. [redacted].

Transcript of Record.

No. 591.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

DELMAR JOCKEY CLUB, A Corporation, Plaintiff in Error,

vs.

THE STATE OF MISSOURI, Defendant in Error.

In Error to the Supreme Court of the State of Missouri.

THE HUGH STEPHENS PRTG. CO., JEFFERSON CITY.

No. 591.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

DELMAR JOCKEY CLUB, A Corporation, Plaintiff in Error,

vs.

THE STATE OF MISSOURI, Defendant in Error.

In Error to the Supreme Court of the State of Missouri.

ABSTRACT OF THE RECORD.

On the 28th day of July, 1905, there was filed in the office of the clerk of the Supreme Court of the State of Missouri by Herbert S. Hadley, Attorney-General of the State of Missouri, an information in the nature of a quo warranto and an order signed by W. C. Marshall, Acting Chief Justice of the Supreme Court of Missouri, upon the clerk of said court to issue an order directed to the Delmar Jockey Club to show by what warrant or authority it claims to hold, use and exercise corporate rights, privileges and franchises under the laws of the State of Mis-

souri, and why it should not be ousted from its franchise, corporate privileges and authority to do business in the State of Missouri, and why its property should not be forfeited unto the State, which said information is in words and figures as follows, to-wit:

INFORMATION.

In the Supreme Court of Missouri, April term, 1905.

State of Missouri, ex informatione, Herbert S. Hadley, Attorney-General,

vs.

Delmar Jockey Club, a Corporation, Respondent.

Comes now Herbert S. Hadley, Attorney-General of the State of Missouri, who in this behalf prosecutes for the State, and informs the court that the Delmar Jockey Club was organized as a corporation under the provisions of article I and article IX of chapter 12 of the Revised Statutes of the State of Missouri for 1899, and the acts amendatory thereof, on or about the 18th day of January, 1901; that the capital stock of said corporation, as stated in the articles of association thereof, was one hundred thousand dollars ($100,000.00), divided into one thousand (1,000) shares of the par value of one hundred dollars ($100.00) each, and the purposes for which said corporation was formed, as alleged in said articles of association, were as follows:

"The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses and other awards and otherwise; to establish and maintain suitable fair

grounds and a race track in the city and county of St. Louis, with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track, public exhibitions of agricultural products and stock, and of speed, or races, between horses, for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto, and to said grounds and track; to engage in pool-selling, book-making and registering bets on exhibitions of speed or races at the said race track and premises, as provided by law, and to let the right to others to do the same; to conduct restaurants, cafes, and other stands, for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

Your Informant further states that since the organization of said Delmar Jockey Club it has become the owner of and is now, and at all times hereinafter mentioned, was the occupant of and in charge of a certain tract of land, known as the Delmar race track, lying partly in the city of St. Louis and partly in the county of St. Louis, upon which said land there was located a race track, and besides other buildings, erections and improvements, a certain shed or building, known as the betting ring or shed, for the purpose of having conducted therein pool-selling, book-making, recording and registering of bets upon contests of speed or powers of endurance between certain horses, upon said race track, and of which said shed or building said respondent, through its officers, agents and representatives, is now and at all the times hereinafter mentioned was, the occupant of and in charge of.

Your informant further states that said respondent, ever since its organization, has continuously, notoriously

and wilfully, within this State and at the county and city of St. Louis aforesaid, offended against and violated the laws of this State, and has grossly perverted, abused and misused its corporate authority, franchises and privileges and has unlawfully assumed and usurped franchises and privileges not granted to it by the laws of the State of Missouri, and especially in the following particulars, to-wit: That from the 18th day of January, 1901, up to the 16th day of June, 1905, said respondent, through its officers, agents and employes, conducted within the building, known as the betting ring or shed, hereinbefore mentioned, on the Delmar race track, the business of book-making, pool-selling, registration of bets and the acceptance of bets, and that during said period, said respondent, acting through its officers, agents and employes in charge of its business, continuously, notoriously and wilfully violated the laws of this State, in that it sold pools and accepted and registered bets from minors upon the result of contests of speed or power of endurance, known as horse races between horses, run on the track of said respondent. That since said 16th day of June, 1905, the said respondent, acting through the officers, agents, employes and representatives in charge of the business of said respondent, has further continuously, notoriously and wilfully offended against and violated the laws of this State, in this, to wit: It has continuously kept and occupied within this State its said shed or building, known as the betting ring or shed, above described, located upon said Delmar race track, with certain books, instruments or devices for the purpose of recording or registering bets and wagers upon the result of trials or contests of speed or power of endurance of horses, which were made and took place upon said race track of said respondent; and it has through its officers, agents, employes and representatives in charge of the conduct of its business con-

tinuously recorded and registered bets and wagers upon the result of trials or contests of speed and power of endurance between certain horses, which were made and took place upon said race track of said respondent; and said respondent, acting through its officers, agents, employes and representatives in charge of its said business, and being the owner, occupant and person in charge of said shed or building, known as the betting ring or shed, as above described, has continuously upon said Delmar race track knowingly permitted said shed or building to be used and occupied for the purpose of recording and registering bets and wagers upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track. And said respondent, acting through its officers, agents, employes and representatives in charge of the conduct of its said business, has continuously kept, exhibited, used and employed in said building, and continuously and knowingly permitted to be kept, exhibited, used and employed in said building, known as the betting ring or shed, upon said Delmar race track, certain devices and apparatus for the purpose of recording bets and wagers upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track.

Your Informant further states that said respondent has never given any exhibition of agricultural products for the purpose of encouraging and promoting agriculture, or for any other purpose; that it has never given any exhibition of contests of speed and races between horses for the purpose of improving the stock of trotting and pacing horses; that it has never established or maintained any fair grounds in the city or county of St. Louis, or any other place.

And your Informant further states that the trial

or contests of speed and power of endurance between horses which were at all the times herein mentioned made and took place upon said Delmar race track, were conducted under the direction, management and control of said respondent, acting through its officers, agents, employes and representatives in charge of its said business, and that said trials or contests of speed and power of endurance between said horses were conducted by said respondent at the times herein alleged for the purpose of enabling the said respondent to do the things and acts hereinbefore alleged to have been done by said respondent, in violation of the laws of this State. That said acts and things done by said respondent as aforesaid, constituted all of the business transacted or things done by said respondent under and by virtue of the franchise and authority conferred upon said respondent as a body corporate under the charter granted to said respondent by the State of Missouri. That by reason of the facts herein stated, said respondent has willfully, continuously and unlawfully misused and abused the franchises, privileges and authority conferred upon it by the laws of the State of Missouri as aforesaid; and that the commission by said respondent of the acts as herein stated in violation of the laws of the State of Missouri have been of great harm and injury to the public and a perversion and misuser of the franchises granted to it by the State of Missouri, and a usurpation of franchises and privileges not granted to said respondent by the State of Missouri; all to the great injury of the general public and the State of Missouri.

Wherefore, Herbert S. Hadley, Attorney-General of the State of Missouri, who prosecutes in this behalf for the State of Missouri, prays the consideration of the court here in the premises that process of law may issue against said respondent, and that said respondent may be

ousted of all its franchises and corporate privileges, and that the same may be declared forfeited, and that all of the property, real and personal, of said respondent, be declared forfeited unto the State.

HERBERT S. HADLEY, Attorney-General.

Afterwards, to-wit: On January 3, 1906, the respondent, the Delmar Jockey Club, filed its answer to said information, which answer is in words and figures as follows, to-wit:

RESPONDENT'S ANSWER.

Respondent, Delmar Jockey Club, comes by its attorneys, and for its answer to the information of the Attorney-General herein, admits that it is a corporation duly organized and incorporated under the laws of the State of Missouri, and denies each and every other allegation in said information alleged or contained.

Wherefore, respondent prays that it be hence discharged with its costs.

II.

For its further answer to that portion of the information of the Attorney-General herein, wherein it is alleged that respondent has failed to exercise certain franchises claimed to be possessed by it, this respondent states that it has fully carried out and exercised all those provisions in its charter authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed and races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and has provided suitable fair grounds for the same, in this, that between the 18th day of January, 1901, and the 16th day of June, 1905, in pursuance of the

provisions and requirements of sections 7419 to 7424, inclusive, Revised Statutes of Missouri, 1899, respondent duly paid large sums of money into the treasury of the State of Missouri, which were placed by the treasurer of the State of Missouri to the credit of the State Fair fund, the same being a fund created by section 7424, Revised Statutes of Missouri, 1899, for the development and advancement of the industrial interests of this State under the direction of the State Board of Agriculture, and that all of said money so paid into said fund was received, used and appropriated by the State of Missouri for the purpose of holding and giving annual exhibitions of agricultural products and stock of every kind and description at the city of Sedalia, State of Missouri, and that the said sums of money paid by respondent into the treasury of the State of Missouri under the terms of sections 7419 to 7424, inclusive, were used and appropriated by the said State of Missouri and its said State Board of Agriculture solely for the maintenance and support of said Missouri State Fair held annually at Sedalia, Missouri, and for the further purpose of providing, constructing, improving and equipping all grounds, stands and buildings necessary for the holding and giving of said fair.

Respondent further states that, by exacting and receiving the said sums of money for the above mentioned purposes, the said State of Missouri intended to and did accept the same as full and complete performance, and use by respondent of its franchise to give exhibitions of agricultural products and stock, and the said State of Missouri thereby intended to and did waive any other or further exercise of such franchise on the part of respondent.

Furthering answering the allegations of non-user from June 16, 1905, to the date of the filing of this in-

formation, to wit: July 28, 1905, respondent states that the franchise of giving exhibitions of agricultural products and stock is not one which can be exercised continuously and at all times from the beginning to the end of the year, but is one, owing to its peculiar character, which can only be exercised during the harvest season of each year. For these reasons, respondent was not required to exercise such franchise between the above specified dates, but respondent further avers that it has in good faith endeavored at all times to exercise the franchises granted to it by its articles of incorporation in the manner and for the purposes intended by such grants, and that such is its purpose in the future, and respondent intends in every way to comply with and perform according to law all the obligations which it assumed upon the grant of the aforesaid franchises to it by the State of Missouri, and respondent again specifically denies each and every charge, allegation or assertion of a contrary purpose on its part contained in the information filed herein.

Wherefore, respondent prays that it be hence discharged with its costs.

BOND & BOND,
C. H. KRUM,
Attorneys for Respondent.

Afterwards, to wit, on the 24th day of January, 1906, the State of Missouri by Herbert S. Hadley, Attorney-General, filed a motion for judgment on the pleadings, which motion is in words and figures as follows, to wit:

MOTION FOR JUDGMENT ON THE PLEADINGS.

Comes now, Herbert S. Hadley, Attorney-General of the State of Missouri, who in this behalf prosecutes for the State, and moves the court for judgment on the re-

turn and answer of respondent herein, for the following reasons:

First: That said return and answer fails to state facts showing any sufficient cause or excuse for, or any legal defense to, the nonuser of respondent's franchises authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed or races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and for the establishing and maintaining of suitable fair grounds in the city and county of St. Louis, as set forth and charged in the information herein.

Second: It appears from the facts stated in said return and answer and the second count thereof that respondent is guilty of the acts of misuser and abuser of its franchises charged in the information herein filed, in this, to wit, that respondent engaged in the business of bookmaking and poolselling, registration of bets and the acceptance of bets in violation of the laws of this State.

Wherefore, informant prays that final judgment of ouster be rendered against the respondent as prayed for in the information in this case.

HERBERT S. HADLEY, Attorney-General.
JOHN KENNISH, Asst. Attorney-General.

Afterwards, to wit, on the 22nd day of November, 1906, the Supreme Court of the State of Missouri rendered the following judgment against the respondent, which judgment is in words and figures as follows, to wit:

JUDGMENT.

State of Missouri, ex informatione, Herbert S. Hadley, Attorney-General,

vs.

Delmar Jockey Club, a Corporation, Respondent.

And now on this day come again the parties by their respective attorneys, and the motion of the Attorney-General for judgment of ouster upon the pleadings heretofore filed and argued, coming on for final judgment, and it now appearing to the court, that heretofore to wit, on the 22nd day of December, 1905, the demurrer of the respondent to the information of the Attorney-General was overruled as to all the grounds of said demurrer, save and except as to the first ground therein specified, and leave was granted respondent to plead over to said information within fifteen days thereafter, and it further appearing that within the time allowed the respondent herein filed its answer to said information and the Attorney-General on January 24, 1906, filed his motion for judgment upon the pleadings, notwithstanding said answer and the said motion has been fully argued and submitted to the Court, it is now considered, ordered and adjudged by the court that the answer of the said Delmar Jockey Club, respondent herein, is not sufficient in law, and the said respondent has not avoided the cause of action in the A ney-General's information stated, and that judgment ouster from the franchises heretofore granted respondent in its articles of incorporation, by the State of Missouri, ought to be given to the State of Missouri for the nonuse of said franchises, notwithstanding its said answer; and it is therefore considered, ordered and adjudged by the court that the said Delmar Jockey Club, respondent herein, has failed to show any good and lawful reason for the nonuse of the franchises granted to it by the State, as charged in the information of the State of Missouri by the Attorney-General, and it is accordingly considered and adjudged that it be, and is hereby ousted of all the rights, franchises and privileges granted to it by the State in its articles of incorporation, and that it pay the costs of this proceeding and that said corporation

be dissolved. It is further considered, ordered and adjudged that the President and Board of Directors of said Delmar Jockey Club, after satisfying the costs heretofore and herein adjudged, proceed at once to wind up and settle the affairs, collect the outstanding debts and divide and distribute the moneys and other property of said Delmar Jockey Club among the stockholders after paying the debts due and owing by such company at the date of its dissolution, and do and perform all other duties devolving upon them as trustees therefor, as provided in section 976, R. S. of Missouri, 1899, and desist from all further exercise of any and all franchises heretofore granted to said Delmar Jockey Club, by virtue of its incorporation under the laws of this State, from and after this day, and that execution issue therefor. (Opinion filed.)

The opinion and decision of the court was as follows:

OPINION OF THE COURT.

IN THE SUPREME COURT OF MISSOURI. IN BANC. OCTOBER TERM, 1906.

State of Missouri, ex inf. Herbert S. Hadley, Attorney-General, Informant,

vs (No. 13,042)

Delmar Jockey Club, a Corporation, Respondent.

On July 28th, 1905, Herbert S. Hadley, Attorney-General, filed in this court his information, ex-officio, in the nature of a quo warranto against the respondent corporation, the purpose of which is to divest said corporation of its franchise and forfeit its property to the State.

To this information the respondent interposed a demurrer, which matter being in issue was submitted to this court and fully disposed of by an opinion by Burgess, J. not yet officially reported, but found in 92 S. W. p. 185, in

which opinion the information is fully set out, and for that reason will not be incorporated herein.

After the disposition of the demurrer by the opinion aforesaid, the respondent filed answer as follows:

"Respondent, Delmar Jockey Club, comes by its attorneys and for its answer to the information of the Attorney-General herein, admits that it is a corporation duly organized and incorporated under the Laws of the State of Missouri and denies each and every other allegation in said information alleged or contained.

Wherefore, respondent prays that it be hence discharged with its costs.

II.

For its further answer to that portion of the information of the Attorney-General herein, wherein it is alleged that respondent has failed to exercise certain franchises, claimed to be possessed by it, this respondent states that it has fully carried out and exercised all those provisions in its charter authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed and races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and has provided suitable fair grounds of the same, in this, that between the 18th day of January, 1901, and the 16th day of June, 1905, in pursuance of the provisions and requirements of section 7419 to 7424, inclusive, Revised Statutes of Missouri, 1899, respondents duly paid large sums of money into the Treasury of the State of Missouri, to the credit of the State Fair Fund, the same being a fund created by section 7424, Revised Statutes of Missouri, 1899, for the development and advancement of the industrial interests of this State under the direction of the State Board of Agriculture, and that

all said moneys so paid into said fund was received, used and appropriated by the State of Missouri, for the purpose of holding and giving annual exhibitions of agricultural products and stock of every kind and description at the city of Sedalia, Missouri, and that the said sums of money paid by respondent into the Treasury of the State of Missouri under the terms of section 7419, to 7424, inclusive, were used and appropriated by the said State of Missouri, and its said State Board of Agriculture, solely for the maintenance and support of the said Missouri State Fair held annually at Sedalia, Missouri, and for the further purpose of providing, constructing, improving and equipping all grounds, stands and buildings necessary for the holding and giving of said fair.

Respondents further state that by exercising and receiving the said sums of money for the above mentioned purposes the said State of Missouri intended to and did accept the same as full and complete performance and use by respondents of its franchise to give exhibitions of agricultural products and stock and the said State of Missouri thereby intended to and did waive any other or further exercise of such franchise on the part of respondent.

Further answering the allegations of non-user from June 16th, 1905, to the date of the filing of this information, to wit, July 28, 1905, respondent states that the franchise of giving exhibitions of agricultural products and stock is not one which can be exercised continuously and at all times from the beginning to the end of the year, but is one, owing to its peculiar character, which can only be exercised during the harvest season of each year. For these reasons respondent was not required to exercise such franchise between the above specified dates, but respondent further avers that it has in good faith endeavored at all times to exercise the franchise granted to it by its articles of incorporation in the manner for the

purposes intended by such grant, and that such is its purpose in the future, and respondent intends in every way to comply with and perform according to law all the obligations which it assumed upon the grant of the aforesaid franchises, to it by the State of Missouri, and respondent again specifically denies each and every charge, allegation or assertion of a contrary purpose on its part, contained in the information filed herein.

Wherefore, respondent prays that it be hence discharged with its costs."

Upon the filing of this answer, the Attorney-General filed motion for judgment upon the pleadings, and the issues thus raised are the ones now for consideration and judgment by the court.

This motion is as follows:

"Comes now Herbert S. Hadley, Attorney-General of the State of Missouri, who in this behalf prosecutes for the State, and moves the court for judgment on the return and answer for respondent herein, for the following reasons:

First: That said return and answer fails to state facts showing any sufficient cause or excuse for, or any legal defense to, the non-user of respondent's franchises authorizing it to give exhibitions of agricultural products and exhibitions of contest or speed or races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and for the establishing and maintaining of suitable fair grounds in the city and county of St. Louis, as set forth and charged in the information herein.

Second: It appears from the facts stated in said return and answer, and the second count thereof, that respondent is guilty of the acts of mis-user and abuser of its franchises charged in the information herein filed, in this, to wit, that respondent engaged in the business of

bookmaking and pool selling, registration of bets and the acceptance of bets in violation of the laws of this State;

Wherefore, informant prays that final judgment of ouster be rendered against the respondent as prayed for in the information in this case."

As a further part of the history of the case it might be said that the court sustained the motion for judgment and entered judgment of ouster and levied a fine of $5,000.00 but filed no opinion.

This judgment of ouster was for both mis-user and non-user, and upon motion for rehearing, was set aside, and said cause taken as submitted on the motion as above stated, and then assigned for opinion.

Points respectively urged by contending counsel will be duly noted in the course of our remarks.

I.

The first question is to determine the effect of respondent's answer. There is first a general denial. This without further pleading would raise the issue both as to the misuser and nonuser, charged in the information. As to nonuser, the general denial first pleaded, is followed by a plea, hereinabove fully set out, which amounts to a plea of confession and avoidance. This answer admits in effect, that it was the duty of the corporation to maintain fair grounds and hold an agricultural fair "in the City and County of St. Louis" as provided by its charter, the language of which charter is as follows:

"The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses and other awards and otherwise; to establish and maintain suitable fair grounds

and a race track in the city and county of St. Louis with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track, public exhibitions of agricultural products and stock, and of speed, or races, between horses, for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto and to said grounds and track; to engage in pool selling, book making, and registering bets on exhibitions of speed or races and the said race track and premises, as provided by law, and to let the right to others to do the same, to conduct restaurants, cafes, and other stands, for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

It undertakes to avoid this admitted failure by saying that by reason of the requirements of section 7419 to 7424 of the Revised Statutes, 1899, it had paid large sums of money into the State Treasury which was used to maintain a State Fair at Sedalia, Missouri. These sections of the Statutes constituted the old law providing for licensing poolselling and bookmaking, and providing that the license fees should go to the State Fair Fund. Even before its repeal, this law, which is Art. II of Chapter 105, Statutes of 1899, in nowise excused the respondent from exercising the franchise granted it to establish and maintain an agricultural fair. Whatever monies it paid the State under these sections of the law, was license fees, belonging to the State, which could have been just as properly put in another fund by the Legislature, as into the State Fair fund. No money paid the State by reason of this law in anywise excuses the respondent for a failure to use the franchises granted to it.

We thus have an admitted failure to exercise the principal and to the State and the public, the most beneficial one of all the rights granted it, and no legal excuse therefor. So that the motion for judgment upon the nonuser should be sustained, unless it can be held that the general denial first pleaded, raises the issue, notwithstanding the later plea of confession and avoidance. This, we think, it does not do. The plea of general denial does not raise an issue where it is followed by a special plea of confession and avoidance. Price v. Mining Co. 85 M. A. l. c. 474; Bank of Monett v. Stone & Prickett, 93 M. A. l. c. 294.

In the Price case, Smith, P. J. said: "It is a rule of pleading, that a general denial is overcome by a subsequent confession and attempted avoidance. McCord v. Railway, 21, Mo. App. 95.

It is a further rule that where a pleading is ambiguous it is to be taken most strongly in its interpretation against the pleader. The defenses pleaded by the answer are clearly inconsistent and should have been stricken out in the court below (Darrett v. Donnelly, 38 Mo. 493 and Adams v. Trigg, 37 Mo. 142), but as they were allowed to stand without objection we must now regard the first, the denial as overcome by that of the subsequent confession and avoidance."

In the latter case, Bank of Monett v. Stone & Prickett, Broadus, J. after a collation of the cases in this State, uses this language, which we approve: "We know of no rule of pleading which permits a party litigant to deny his adversary's allegations, and at the same time to confess and avoid them. At common law the rule required the pleader to admit his adversary's cause of action and then to allege matters by way of avoidance. Stephens' Pleading, p. 90. There is no question but what the answer is in violation of the common law rules of pleading, but it is also at variance with our code regulating

the subject. Our courts, in passing on the question, have held such pleas to be defective. 'A party cannot traverse and at the same time confess and avoid the same allegations.' Coble v. McDaniel, 33 Mo. 363; Darrett v. Donnelly, 38 Mo. 492; Adams v. Trigg, 37 Mo. 141; Atteberry v. Powell, 29 Mo. 429. In short, such a plea is subject to the objection of being inconsistent with itself. and also the charge of duplicity."

See also: McCord v. Doniphan Branch Ry. Co., 21 M. A. l. c. 95, and cases cited therein.

We conclude, that as to the charges of nonuser contained in the information, they stand as confessed under the pleadings and the question next for consideration is whether or not for this confessed dereliction ouster should go, and if so, to what extent. This question we consider next.

II.

Courts move cautiously in taking from corporations their charter grant of franchises. No insignificant act of either misuser or nonuser will suffice for the exercise of the power vested in the courts, but the courts can and will forfeit all the franchises of a corporation for either misuser or nonuser if the acts or omissions are sufficiently great. In fact, it may be said that forfeiture may be declared upon either of three grounds, (1) wilful nonfeasance or nonuser, (2) wilful misfeasance or misuser, (3) usurpation of powers not granted. 10 Cyc. p. 1280.

Justice Story of the U. S. Supreme Court at an early day announced the doctrine thus: "A private corporation created by the Legislature may lose its franchises by a misuser of *nonuser* of them; and they may be resumed by the Government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition an-

nexed to the creation of every such corporation." Terrett et al. v. Taylor et al., 9 Cranch, l. c. 51.

Lewis, C. J., Supreme Court of Pennsylvania, in case of Commonwealth v. Bank, 28 Pa. St. l. c. 389, uses this language: "It may be affirmed as a general principle, that where there has been a *misuser*, or a nonuser, in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or *omissions* complained of have been repeated and wilful, they constitute a good ground of forfeiture."

The Supreme Court of Mississippi says: "The acts of misuser or *nonuser* must be touching matters which are of the essence of the contract between the sovereign and the corporation, and they must be wilful and repeated."

Atty. Gen. vs. Ry. Co., 51 Miss. l. c. 608.

In Iowa, the doctrine is thus stated: "A failure to substantially comply with the express provisions or conditions of the articles and of the general laws, or a wilful misuse or *nonuse* in regard to matters which go to the essence of the contract between the corporation and the State, are acts and *omissions* which amount to forfeiture. Ang. & A. Corp., section 774; Boone, Corp., section 203; Mor. Priv. Corp., 1014; Tayl. Corp., section 457; Wat. Corp., section 427; Ins. Co. vs. Needles, 113 U. S. 547; 5 Supt. Ct. Rep. 681; State vs. Minnesota Central Ry. Co., 36 Minn. 246, 30 N. W. Rep. 816; State vs. Council Bluffs & N. Ferry Co., 11 Neb. 354; 9 N. W. Rep. 563; State vs. Farmers College, 32 Ohio St. 487. Courts act with extreme caution in proceedings like this, and forfeitures will not be declared, except under the express provisions of the charter, or for a plain misuse or *nonuse* of powers, by which the corporation fails to fulfill the design and purpose of its organization. State vs. Farm-

ers College, supra; State vs. Commercial Bank, 10 Ohio St. 535; Harris vs. Ry. Co., 51 Miss. 602; Ry Co. vs. People, 73 Ill. 541; State vs. Real Esate Bank, 5 Ark. 595; State vs. Societe Republicaine, 9 Mo. App. 114. It is only such acts or omissions as concern matters which are of the essence of the contract between the State and the corporation, or, in other words, in which the public has an interest, that are causes of forfeiture. Commercial Bank vs. State, 6 Smedes & M. 599; Attorney-General vs. Petersburg & R. Ry. Co. 6 Ired. 456; Harris vs. Ry. Co. 51 Miss, 602; State vs. Council Bluffs & N. Ferry Co., supra; Thompson vs. People, 23 Wend, 193; State vs. Real Estate Bank, supra; State vs. Minnesota Central Ry. Co., supra."

In addition to the cases quoted from, and the cases cited in the quotations, many others along the same line could be cited. Suffice it to say, that the courts hold, and rightfully, that where there is either wilful misuse or wilful nonuse of the franchise or franchises, which are of the essence of the contract with the State, and those in which the State or public is most interested, then a forfeiture of the whole charter should be and will be declared. When a corporation receives from the State a charter granting certain franchises or rights, there is at least an implied or tacit agreement that it will use the franchises thus granted; that it will use no others, and that it will not misuse those granted. A failure in any substantial particular entitles the State to come in and claim her own, the rights theretofore granted, and this through a judgment of forfeiture in a proceeding like the one at bar.

The right to construct and maintain suitable fair grounds in the city and county of St. Louis, and to give exhibitions of agricultural products thereat, is one of the essence of this contract between the State and the respondent. It was and is the franchise, in the exercise

of which, the State and general public have the most interest and concern. A failure to exercise this franchise was a failure to perform the very thing which was of the essence of the contract. That this failure was wilful is shown by the length of time of the admitted nonuser as well as by other things made apparent by the pleadings. So far as the State and general public are concerned this right of franchise, so long neglected, was leading and uppermost in interest. No legal excuse is offered for respondent's failure. It would appear, at least by inferences deducible from the pleadings, that respondent was alert in promoting that incidental feature of its charter, gambling upon horse races, and furnishing its gamblers with refreshments, both liquid and solid, but extremely indifferent as to doing the things, moral in character, which it had, by receiving its charter, tacitly agreed to do, and the only things in which the State and public had any special interest.

Such a flagrant and wilful nonuser of franchises, which are of the very essence of the grant, demand, in our judgment, the forfeiture of all the rights and franchises granted, and we, therefore, hold that there shall be a judgment decreeing a forfeiture of all the rights and franchises granted to respondent by its charter and a dissolution of said corporation.

III.

We reach now the interesting proposition of this case, and that is whether or not, in addition to ousting respondent from its franchises, we can and should appropriate a part of its substance to the use and benefit of the State.

The State often grants to corporations many rights which inure largely to the benefit of the corporation and not to the benefit of the State, but with the sweet a tinge of bitter is usually found in the shape of some important

right or franchise, the exercise of which by the corporation does redound to the benefit of the State. This benefit is a consideration for the grant of the other rights largely beneficial to the corporation. In our previous proposition we do not hold that a forfeiture should follow the mere nonuser of such rights and franchises as inure largely to the interest of the corporation and are of no special interest to the public, but we do hold that if the franchise or right not used is the principal one in which the State is interested, and is of the very essence of the contract, and there is wilful nonuser, then a forfeiture should be declared. Then, in addition to a judgment of ouster, what, if anything further, should be done. It is urged by respondent that for mere nonuser no fine or taking of property can be added to the judgment of ouster. In our opinion it makes no difference upon what ground the ouster is placed, whether misuser, nonuser or usurpation of rights. These proceedings are no longer recognized as criminal proceedings and have not been so recognized since the early days of the common law, but we have continually imposed what are called fines, a term no doubt coming down from the time when the proceeding was looked upon as a criminal proceeding. The implied contract with the State, when the charter was given respondent, was that it would exercise and use the granted rights; that it would use none other, or, stated otherwise, that it would not usurp other rights; that it would rightfully use the powers granted and not misuse them. A wilful failure of either of these covenants with the State will authorize a forfeiture, and why not a fine? We forfeit for nonuser, and why? Because there has been a failure to perform the obligations to the State. Because there has been a violation of the contract with the State. Misuser is likewise a violation of the implied agreement with the State. So is usurpation. Each are but violations of the implied contract with the State, and

23

for these violations we declare forfeitures; why not fix penalties and punishments in the one as in the other? The gist of each in quo warranto is the wilful violation of the rights of the State under the implied contract, and not the violation of some criminal law, for we do not try criminal cases and affix criminal punishments in quo warranto proceedings. The violation of a corporation's contract with the State by misuser or usurpation may be evidenced by the fact of the violation of some statute, criminal in character, but in this kind of proceeding we try the right of the corporation to further hold its franchises, not the question of finding its guilt or innocence under the statute and fixing punishment permitted by the statute. It is the only way the State has of preventing the abuse of the confidences it has reposed in these corporate creatures which are of its own making. This abuse may be by nonuser, misuser or usurpation, but in our judgment, the State has the same rights in each event, both as to the forfeiture and the fine.

In the case at bar, the conditions presented practically amount to a misuser. Here the State grants several powers to respondent, but with the central thought and purpose of procuring an agricultural fair. As an inducement and to encourage respondent in so doing, other powers are given which inure to the financial benefit of the corporation. The maintenance of an agricultural fair we know often proves a financial loss. Here we have the respondent sorting out the bitter from the sweet—exercising those powers which inure to its own benefit and wilfully neglecting those in the interest of the public. This wilful conduct, considering the powers granted as a whole, with the central purpose in that whole, to construct fair grounds and buildings, and maintain an agricultural fair, might be said to even be a misuser of its powers and franchises—and such a misuser as would authorize both fine and forfeiture.

But returning to the question of nonuser, pure and simple, the overwhelming weight of authority is to the effect that the court can forfeit the franchise for nonuser. Forfeiture is but taking from the corporation, its property, its corporate rights which are a part of its property. Forfeiture is not only the taking of property, but it is further punishment by putting to death the corporation itself. It we can take one class of the corporation's property for mere nonuser, why not another? This respondent claims that the rights and franchises granted and which it is exercising are valuable. If we can take them for nonuser, why can't we go further and say that we will not only punish you by forfeiture of all these valuable rights, which you hold as your property, and by putting you to death by dissolution, but we will, because of the wilful wrong to the State, take from your gains a further portion of your property? We see no distinction. The character of the judgment is within the discretion of the Court. The doctrine is announced broadly in 10 Cyc. p. 1279, as follows:

"It may be collected from a comparison of a number of decisions speaking upon that question that, although the grounds of forfeiture have been clearly made out, yet the question of imposing the severe penalty of the law is committed to judicial discretion so far as mitigation is concerned, unless a judgment of ouster is commanded by a statute in such terms as leaves the court no discretion."

And in High's Extraordinary Legal Remedies, p. 702, sec. 758, as follows:

"The propriety of imposing a fine in addition to a judgment of ouster is regarded as a matter of sound judicial discretion, and when no improper motives are alleged or shown against the party ousted, the fine imposed will be merely nominal."

Our own court, through Marshall, J., in case of State ex inf. vs. Armour Packing Co., 173 Mo. l. c. 392, said:

"This leaves only the question of punishment. The punishment to be imposed rests in the sound judicial discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular act complained of (State ex inf. vs. Lincoln Trust Co., 144 Mo. 562; State ex rel. vs. Gas and Oil Co., 153 Ind. 483; State ex rel. vs. Railroad, 47 Ohio St. 130; State ex rel. vs. Standard Oil Co., 49 Ohio St. 137; Yore vs. Superior Court, 108 Cal. 431; State vs. Turnpike Co., 10 Conn. 167; State ex rel. vs. Topeka, 30 Kans. 653; People vs. Railroad, 15 Wend. 113; Commonwealth vs. Canal Co., 43 Pa. St. 301), or it may be a suspensive judgment of ouster with a fine accompaniment (State ex inf. vs. Ins. Co., 152 Mo. 1), or it may be a simple fine, if it appears that the trust, pool or conspiracy complained of and proved, has been abandoned. In short the character of the judgment rests in the discretion of the court. (5 Thompson on Corp., sec. 6812; Westin vs. Lane, 40 Kas. 479; State ex rel. vs. Railroad, 91 Iowa, 517; State ex inf. vs. Bernoudy, 36 Mo. l. c. 281.)"

In the Packing Company case, supra, it is true the implied contract with the State was violated by misuser of powers granted, but the penalties fixed, $5,000.00, was not under section 8968, the quasi criminal section of the law, but under the broad right of the court to control the creatures of the State by taking their property from them, whether it be their franchises or other kinds of property.

In fact, Judge Marshall, on page 380 of 173 Mo., in the Packing Company case, expressly says that the fines and penalties fixed by the statutes, at least quasi criminal,

if not criminal, are not considered in the case. His language is: "Other penalties and forfeitures are imposed by section 8968, but are not involved in or sought to be enforced in this proceeding."

What is true of this case is true of other cases where the court, in its discretion, has by its judgment forfeited to the State a part of the property of the corporation. Without lengthening an argumentative opinion, already too long, we conclude that this Court has the right to add to its judgment of ouster and dissolution, what is usually termed a fine; that the fine heretofore originally fixed, $5,000.00, is not an unreasonable one; that the judgment of this court should and will be to the effect that respondent is ousted of all of its charter rights and the same forfeited to the State; that out of its property it pay to the State the sum of five thousand dollars, together with the costs of this action, and that said corporation be dissolved, and it is so ordered.

IV.

Upon a reading and consideration of the foregoing opinion, written by Graves, J., Valliant, and Lamm, J. J. concur in toto. Fox, J., concurs in the second paragraph or proposition thereof, and expresses no opinion as to the first paragraph or proposition, but dissents from the third paragraph. Brace, C. J. and Gantt, and Burgess, J. J. concur in the opinion except as to the third paragraph thereof.

It therefore follows that by the opinion of the majority of this court that the respondent should be ousted of all of its franchises and charter grants, and that the same be forfeited to the State the corporation dissolved, but that no further fine or punishment be inflicted, and that the judgment of the court go to that effect and that respondents pay the costs. It is accordingly so ordered.

W. W. GRAVES, J.

Afterwards, towit: On the 29th day of November, 1906, the respondent, the Delmar Jockey Club, filed in said court a motion for a rehearing of said cause, which motion is in words and figures as follows, towit:

MOTION FOR REHEARING

IN THE SUPREME COURT OF MISSOURI.

(COURT EN BANC.)

OCTOBER TERM, 1906.

STATE EX REL. ATTORNEY-GENERAL

vs.

DELMAR JOCKEY CLUB.

Respondent respectfully moves the court for a rehearing in the above cause for the following reasons:

I.

The court misinterpreted the nature and character of the various franchises granted by the State of Missouri to respondent, which are set forth in its charter of incorporation, in this:

A. The court overlooked the fact that the permission given respondent to make agricultural exhibits was not of the *essence* of its contract with the State, but was simply a subsidiary franchise upon the exercise of which respondent's right to be a corporation was not made to depend.

B. The court overlooked the fact, shown by the record in this case and by matters within its judicial knowledge, that the particular franchise granted to respondent and upon which its right to be a corporation depended, was the franchise of conducting, under the law then in force, racing meets and giving exhibitions of

horse racing for purses or prizes, and otherwise, as contemplated by the act providing for a State Fair fund and being article II, chapter 105, sections 7419 to 7425, inclusive, of the Revised Statutes of Missouri of 1899.

C. The court overlooked the fact that the above quoted sections of the statute, which were substantially in existence at the time of respondent's incorporation, and the title of respondent as a corporation, and the purposes set forth in respondent's charter, and the facts within the judicial knowledge of the court that the statutes in question were enacted for the specific purpose of enabling corporations and persons to engage in the business defined in them for pecuniary profit, demonstrate that the particular charter taken by respondent was for the purpose of conducting the business contemplated by such statutes.

II.

The opinion of the court overlooked the fact, patent on the face of the information of the Attorney-General in this cause, that it was the purpose of said proceeding to destroy the charter of respondent for alleged criminal practices, and that except upon the assumption that respondent and its officers had been and were engaged in such alleged criminal practices, this proceeding would not have been instituted.

All of which is shown by the record in this case and by this court's knowledge of the positions taken on the oral argument and briefs heretofore filed, and by the necessary construction which the court is bound to put upon the allegations of the information filed herein.

III.

Because the court has misapprehended the effect in law of the answer filed by respondent in this cause.

A. In this: That the second defense of the answer does not confess omission by respondent to exercise the right to give fairs, for the second defense of respondent's answer simply pleads estoppel, and neither at common law nor under the code can a plea of estoppel be confounded with a plea of confession and avoidance.

B. Because the court, in its opinion, in discussing the plea of estoppel, states that the large sums derived by the State for licenses from the conduct of races by respondents and other corporations constituted revenue which the State might divert from the State Fair for whose support such licenses were collected by the State. This statement in the opinion shows the court overlooked section 7424 of the Revised Statutes of Missouri of 1899, which specifically creates a State Fair fund out of the proceeds of such licenses. The statement of the opinion further overlooks the fact that such licenses have been uniformly turned over to said State Fair in accordance with said section of the statute (7424), and the receipts thereof have been acknowledged in the biennial reports of the State Board of Agriculture, made in pursuance with section 7418 of said statute.

IV.

The opinion in this case overlooks the fact that the information filed by the Attorney-General, if it could be construed as stating any ground of forfeiture for mere nonuser of a subordinate and incidental franchise to give fairs, is fatally defective in this, that it attempted to conjoin such ground of forfeiture with the real and substantial grounds of forfeiture, set out in said information, on account of the alleged criminal practices of respondent, and the opinion overlooks the fact that neither at common law nor under the code procedure could there be such a conjunction of different causes of action in the

same count, and the opinion overlooks the further fact that the motion for judgment being in legal effect a mere demurer, must for that reason be denied, because a demurrer is a general fault finder and runs back to the first defect in the proceedings, and in this case seizes upon the illegal joinder of causes of action in the same count of the information.

V.

Under the court's decision, respondent would be deprived of its property without a trial of the issues, and without due process of law.

Respectfully submitted,

HENRY W. BOND,
THOMAS BOND,
Attorneys for Respondent.

Copy of the above motion received this, the 29th day of November, 1906.

....., Attorney-General.

And afterwards, to wit: On the 18th of December, 1906, the court made an order overruling said motion for rehearing, which order is in words and figures as follows, to wit:

ORDER OF THE COURT OVERRULING MOTION FOR REHEARING.

State ex. inf. Attorney-General,
vs.
Delmar Jockey Club, a Corporation, Respondent.

Now at this day, the court having fully considered and understood the motion heretofore filed for a rehear-

ing herein, doth order that said motion be and the same is hereby overruled.

And afterwards, upon the petition and application of the respondent, Delmar Jockey Club, to wit, on the 3rd day of January, 1907, the Supreme Court of the State of Missouri, through its Chief Justice, James B. Gantt, allowed its writ of error and issued a citation thereon in said cause, which writ of error and citation are in words and figures as follows, to wit:

WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

The President of the United States.

To the Honorable, the Judges of the Supreme Court of Missouri, Greeting.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, at the October term, 1906, thereof, between the State of Missouri, ex-information of the Attorney-General, Relator, and Delmar Jockey Club, respondent, a manifest error hath happened, to the great damage of the said respodent, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceed-

ing thirty days from and after the date of the citation in said cause in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of January in the year of our Lord One Thousand Nine Hundred and Seven.

Issued at office in the City of Jefferson with the seal of the Circuit Court of the United States, for the Western District of Missouri, Central Division, dated as aforesaid.

H. C. GEISBERG,

Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by JAMES B. GANTT,

Chief Justice of the Supreme Court of Missouri.

CITATION.

THE UNITED STATES OF AMERICA.

To the State of Missouri, ex-information Attorney-General, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Missouri, wherein Delmar Jockey Club is plaintiff in

error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James B. Gantt, Chief Justice of the Supreme Court of Missouri, this 3rd day of January in the year of our Lord One Thousand Nine Hundred and seven.

JAMES B. GANTT,
Chief Justice of the Supreme Court of Missouri.

United States of America,
Central Division of the Western District of Missouri. } ss.

I hereby acknowledge due service of the within Citation, this —— day of January, A. D., 1907.

HERBERT S. HADLEY,
Attorney for Defendant in Error.

That there was annexed to and returned with said writ of error an assignment of errors, which assignment of errors is in words and figures as follows, to wit:

ASSIGNMENTS OF ERROR.

IN THE SUPREME COURT OF MISSOURI. OCTOBER TERM, 1906.

State of Missouri, on the information of Herbert S. Hadley, Attorney-General, Relator,

vs.

Delmar Jockey Club (a Corporation), Respondent.

Now comes Delmar Jockey Club, respondent herein, and for the purpose of becoming plaintiff in error in this

cause from the Supreme Court of Missouri to the Supreme Court of the United States, assigns errors in the judgment of said Supreme Court of Missouri and says, that in the record and proceedings in this cause, wherein the Supreme Court of Missouri has rendered its judgment ousting said Delmar Jockey Club of its franchises and corporate existence and thereafter overruling a motion filed by said Delmar Jockey Club for a rehearing of the judgment heretofore rendered against it, there was manifest error to the prejudice of said Delmar Jockey Club in its rights under the Constitution of the United States duly set up and claimed by it in said cause, as will appear from the record therein as follows:

First: The Delmar Jockey Club, respondent herein, is a corporation duly organized and incorporated under the laws of the State of Missouri governing the organization and incorporation of manufacturing and business corporations, and as such was incorporated by the State of Missouri for the principal purpose of engaging in the business of holding racing meetings and aiding the State of Missouri in carrying out the purposes and objects set forth in Chapter 105, articles 1 and 2, sections 7405, 7424, inclusive, of the Revised Statutes of the State of Missouri, that said corporation was also granted in its charter other incidental or permissive franchises. That at the time of the incorporation of respondent the statutes of the State of Missouri provided for a large revenue to the State to be derived from the racing business which respondent was authorized to engage in by its said charter, which said revenue said statutes further provided should constitute a State Fair Fund, to be used for the support and maintenance of a State Fair to be held annually at a place to be selected by the State Board of Agriculture, and which was subsequently located at Sedalia, Missouri; that the Statutes and Acts thus referred to were known as the Breeder's Bill or State Fair Fund Law. That at all times,

from the date of its incorporation until the 16th of June, 1905 (when said Breeder's Bill was repealed by the Legislature of Missouri), respondent fully exercised its franchise to hold racing meetings and conducted and operated the same in the county of St. Louis and State of Missouri. That during the whole of said period the State of Missouri co-operated with respondent in the exercise of its said chartered franchises by issuing licenses therefor under the terms of said Statutes and exacting and receiving from respondent the sums paid to the State under said Breeder's Law and appropriating the same to the support of the State Fair at Sedalia, Missouri.

Respondent states that at no time during the existence of said Breeder's Law and during the co-operation of the State, in the exercise by respondent of its franchise according to said Statutes, did the State of Missouri or any of its officers or any citizens or representative of the public complain that respondent had not also exercised its incidental or permissive franchise to give local fairs, nothwithstanding which respondent states that immediately after the repeal of said Breeder's Law the Attorney-General of the State of his own motion instituted the present proceeding against respondent in the Supreme Court of Missouri for the express purpose of totally destroying its charter for the alleged misuser and abuser of its principal franchise to conduct racing meetings and for the alleged nonuser of its permissive right or franchise to give local fairs in the county of St. Louis.

Respondent alleges that such proceedings were had in the Honorable Supreme Court of Missouri after the consideration of demurrers filed to said suit of the Attorney-General, and also answers thereto, as resulted in a judgment of said court totally destroying all the franchises and the corporate life of respondent upon the sole ground of an inferred or assumed nonuser by it of its permissive right to give local fairs in the county of St.

Louis during the existence of the aforesaid Breeder's Law, and during the time which, in pursuance of the provisions of said law, respondent and the State of Missouri did co-operate together as aforesaid in the exercise of plaintiff's franchises to give racing meetings under the provisions of said Breeder's Law.

Respondent assigns said judgment of the Supreme Court of Missouri as error and in violation of its rights under the Constitution of the United States, in this:

First. That in and by said judgment of said Supreme Court an unjust and unequal enforcement of the Breeder's Law is worked and brought about against respondent in error in that by the effect of said judgment and decision of the Supreme Court the said respondent is made to suffer a forfeiture of its charter and a destruction of its property for assumed or inferred acts of nonuser of a permissible and ancillary grant in its charter during a period of time wherein the said State of Missouri, by its own act and in full cognizance of the acts and doings of respondent under its said charter, cooperated in the exercise of the principal grant contained in said charter and estopped itself by such act and by taking the profits of such co-operation from inquiring any further as the non-exercise of any subsidiary right or franchise granted in said charter.

Second. That in and by said judgment and decision of said Supreme Court the said act repealing the aforesaid Breeder's law is made to have retrospective operation and effect, in that it is made the basis of a judgment depriving plaintiff in error of its corporate life and property for assumed or inferred nonuser of a permissive franchise granted to plaintiff in eror during the time said Breeder's law was in full force and effect, thereby impairing the contract between the State and plaintiff in error entered into and made by the terms and provisions of the articles of incorporation granted to respondent, and

which contract, though lawfully performed, was, by said judgment, thereafter impaired and annulled, and respondent was deprived of its property without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

Third. That upon the face of said proceeding existing in said Supreme Court of Missouri at the time of its final decision herein, and at the time of the overruling of the motion for rehearing filed herein, it is apparent that the property and corporate rights of respondent in error were taken from it without due process of law and against the law of the land, in this, that the inferred nonuser upon which the said court based its judgment was traversed and denied and further shown to be a matter which the State was estopped to inquire into by the averments and allegations of the pleadings filed by respondent, notwithstanding which and without any trial of the issues thus tendered, said judgment and decision depriving respondent of its property and corporate rights was rendered, against the law of the land.

Respondent further assigns error in the judgment of the said Supreme Court of Missouri in this, that quo warranto will not lie to compel the observance of a criminal statute or to punish its violation and the information filed herein by the Attorney-General of the State of Missouri, in so far as it seeks to oust the Delmar Jockey Club of its franchises for the alleged violation of a criminal statute of the State of Missouri, does not state a cause of action, and any judgment rendered upon such an information is a denial of the right of trial by jury, in violation of Article VI of the Amendments to the Constiuttion of the United States, and is a deprivation of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

Respondent further assigns error in the judgment of

the said Supreme Court of Missouri in this, that the information neither charges nor alleges that any of the officers or agents of said corporation have been prosecuted under indictment or upon verified information for the felonies charged therein, and have been, after trial, found guilty thereof, but prays the Supreme Court of Missouri to convict certain persons of the felonies charged in said information without the intervention of constitutional methods, and in a manner unknown to the law of the land, and the judgment of the Supreme Court of Missouri rendered in such a proceeding upon such an information amounts to a deprivation of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Respondent further assigns error in the judgment of the said Supreme Court of Missouri in this, that the judgment of the Supreme Court of Missouri deprives the stockholders of the Delmar Jockey Club of their property without due process of law, and without due conviction of any of the agents and officers of said corporation, of any of the felonies charged in the information, in violation of the Fourteenth Amendment to the Constitution of the United States.

Respondent, Delmar Jockey Club, presents the foregoing assignments of error in order that it may appear of record in this cause that it is entitled to a reversal and an annulment of said order and decree of the Supreme Court of Missouri and to obtain right and justice in the premises, and to that end that a writ of error to the Supreme Court of the United States may be granted to respondent.

Respectfully submitted,

HENRY W. BOND,

THOMAS BOND,

Attorneys for Plaintiff in Error.

INDEX.

	Page
Information	1
Answer	7
Motion for Judgment	9
Judgment	10
Opinion of Court	12
Motion for Rehearing	28
Order of Court Overruling Motion for Rehearing	31
Writ of Error	32
Citation	33
Assignments of Error	34

APR 4 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1906

DELMAR JOCKEY CLUB, a Corporation,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI,
Defendant in Error.

No. 219.

ADDITIONAL EXTRACTS FROM THE RECORD, AND STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS AND AFFIRM.

Henry W. Bond,
Thomas Bond,
Attorneys for Plaintiff in Error.

Mockler Ptg. Co., St. Louis.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1906

DELMAR JOCKEY CLUB, a Corporation,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI,
Defendant in Error.

No. 591

STATEMENT OF FACTS INCLUDING EXTRACTS FROM THE RECORD IN ADDITION TO THOSE SET OUT IN THE TRANSCRIPT OF DEFENDANT IN ERROR.

The transcript of the record filed herein by defendant in error while correct as far as it goes, wholly omits all of those portions of the record wherein the federal questions now relied upon were specificaly called to the attention of the Supreme Court of Missouri. In order therefore that the constitutional rights and immunities insisted upon by plaintiff in error throughout this entire proceeding in the

Missouri Court may be apparent, we submit the following extracts from the record in addition to those contained in the transcript heretofore filed by defendant in error.

At the April Term, 1905, the Attorney General of the State of Missouri filed in the Supreme Court of Missouri an ex-officio information in the nature of a quo warranto seeking to annul the charter of plaintiff in error and forfeit all of its franchises and property for the following alleged acts of abuse, misuse, and nonuse of its corporate powers and privileges:

First. Engaging in bookmaking, pool selling and the registration of bets from the date of its incorporation up to the 16th day of June, 1905.

Second. Engaging in bookmaking, pool selling and the registration of bets with minors from the date of its incorporation up to the 16th day of June, 1905.

Third. Engaging in bookmaking, pool selling and the registration of bets since June 16, 1905, in violation of the act of the Legislature of Missouri, approved March 21, 1905.

Fourth. The alleged failure on the part of plaintiff in error to exercise its permissive franchises to give agricultural exhibitions in the City or County of St. Louis or elsewhere.

To this information which is correctly set out on pages 2 to 7 of the transcript prepared by defendant in error, plaintiff in error filed its demurrer which said demurrer is not set out in the aforesaid transcript and which we therefore set out herein and which is in words and figures as follows, to-wit:

> "The respondent now comes and says that the information filed herein is insufficient in law, and that

it ought not to be required to answer the same; and the respondent further says that the said information *is so insufficient in this:*

1. That the portion, which relates to acts of bookmaking, poolselling and registration of bets described as the business carried on by the respondent from January 18, 1901, to June 16, 1905, does not state violations of law, because such acts were lawful, there being no averment that the defendant was not licensed to do such acts.

2. That portion which alleges that the respondent during such period 'sold pools and accepted and registered bets from minors' does not state violations of law, because it is not alleged that the respondent knew that the persons whose bets were registered were minors, and there is no averment that the respondent was licensed to sell pools or register bets.

3. That portion which relates to acts of bookmaking and registering bets and to acts of permission to others to make books or register bets, and to keeping and using devices for recording bets, after June 16, 1905, does not state violations of law, because a corporation cannot commit a felony, or felonies, and the offense of bookmaking, poolselling, or registering bets and the like is denounced a felony by the Statutes of this State.

4. That the information does not state any facts upon which a judgment of ouster could lawfully be based, for the obvious reason, that to violate a criminal statute is not the usurpation, or misuser of a franchise, there being a marked difference between franchises and felonies or misdemeanors, and quo warranto will

not lie to compel the observance of a criminal statute, or to punish its violation.

5. The information neither alleges nor charges that the stockholders of the defendant corporation directed or authorized its alleged officers to violate the criminal laws of the State or to commit the felonies charged in said information.

6. The information neither alleges nor charges that any of the officers or agents of said corporation have been prosecuted under indictment or upon verified information for the felonies charged therein, and have been after trial found guilty thereof, but seeks to have this honorable court convict certain persons of the felonies charged in said information without the intervention of constitutional methods, and in a manner unknown 'to the law of the land.'

7. That said information shows on its face that it seeks to deprive the stockholders of said corporation of their property without due process of law and without due conviction of any of the agents and officers of said corporation of the felonies imputed to it in said information.

8. Because said information seeks to have this court adjudge specific persons to be guilty of felonies without the aid of a prior indictment or verified information charging such offenses, and without trial by jury, as guaranteed in the Constitution of the State.

9. That the act of the General Assembly, entitled 'An act prohibiting bookmaking and poolselling and prescribing a penalty therefor,' approved March 21, 1905, is void, because it violates Section 28 of Article IV of the Constitution, in that it contains two sub-

jects, to-wit: The prohibition of bookmaking and the prohibition of poolselling, which are two distinct subjects matter which have no relation to each other. and are not germain.

Wherefore, the defendant prays judgment, etc.

(Signed) CHESTER H. KRUM,
BOND & BOND,
For Respondent."

Thereupon at the October Term, 1906, after hearing argument and considering briefs the Supreme Court of Missouri in its opinion reported in 92 S. W. page 185 sustained the first ground of said demurrer and overruled all the others, and granted plaintiff fifteen days in which to answer the remaining allegations in said information, to-wit:

Second. Engaging in bookmaking, poolselling and the registration of bets with minors from the date of its incorporation up to the 16th day of June, 1905.

Third. Engaging in the business of bookmaking, poolselling and the registration of bets since June 6th, 1905, in violation of the act of the Legislature of Missouri approved March 21, 1905.

Fourth. The alleged failure on the part of plaintiff in error to exercise its permissive franchises to give agricultural exhibitions in the City or County of St. Louis or elsewhere.

Thereupon and within said fifteen days plaintiff in error duly filed its answer, which said answer is correctly set out in the transcript prepared by defendant in error herein on pages 7 to 9 thereof. Defendant in error thereupon filed its motion for judgment on the pleadings, which said motion is correctly set out in the transcript of defendant in

error on pages 9 and 10, and thereafter the cause having been argued and submitted to the court on the information, the answer, and the motion, said motion for judgment on the pleadings was sustained and judgment of ouster entered by the Supreme Court of Missouri on the first day of June, 1906, against plaintiff in error, and a fine of $5,000 was imposed upon plaintiff in error because of an alleged *nonuse, misuse, perversion* and *violation* of its franchises, which said judgment is not set out in the transcript prepared by defendant in error and which is therefore set out herein and is in words and figures as follows, to-wit:

"State of Missouri, ex
Information, Herbert S. Hadley,
Attorney General.

vs.

Delmar Jockey Club, a corporation,
Respondent.

And now on this day come again the parties by their respective attorneys and the motion of the Attorney General for judgment of ouster upon the pleadings heretofore filed and argued, coming on for final judgment, and it now appearing to the court, that heretofore to-wit: On the 22nd day of December, 1905, the demurrer of the respondent to the information of the Attorney General, was overruled as to all the grounds of said demurrer save and except as to the first ground therein specified and leave was granted respondent to plead over to said information within fifteen days thereafter and it further appearing that within the time allowed the respondent herein filed its answer to said information and the Attorney General on January, the 24th, 1906, filed his motion for judgment upon the pleadings notwithstanding said answer and the said motion has been fully argued and submitted to

the Court, it is now considered, ordered and adjudged by the Court that the answer of said Delmar Jockey Club, respondent herein, is not sufficient in law and the said respondent has not avoided the cause of action in the Attorney General's information stated and that judgment of ouster from the franchises heretofore granted respondent in its articles of incorporation, by the State of Missouri, ought to be given for the State of Missouri for the *nonuse, misuse* and *perversion* of said franchises, notwithstanding its said answer, and it is therefore considered ordered and adjudged by the Court that the said Delmar Jockey Club, respondent herein, has failed to show any good and lawful reason for the nonuse, misuse, perversion and violation of the franchises granted to it by the State as charged in the information of the State of Missouri by the Attorney General and it is accordingly considered and adjudged that it be and is hereby ousted of all the rights, franchises and privileges granted to it by the State, in its articles of incorporation and it is further considered, ordered and adjudged that a fine of five thousand dollars be and is hereby imposed upon said respondent for its unlawful abuse, nonuse, misuse and perversion of said franchises and that the State of Missouri have and recover of said respondent the said sum of five thousand dollars as and for such fine and all the costs of this prosecution and have execution therefor. It is further considered, ordered and adjudged that the President and Board of Directors of said Delmar Jockey Club, after satisfying the fine and costs heretofore and herein adjudged, proceed at once to wind up and settle the affairs, collect the outstanding debts and divide and distribute the moneys and other property of said Delmar Jockey Club among

the stockholders after paying the debts due and owing by such company at the date of its dissolution, and do and perform all other duties devolving upon them as trustees therefor as provided in Section 976 R. S. of Missouri, 1899, and desist from all further exercise of any and all franchises heretofore granted to said Delmar Jockey Club, by virtue of its incorporation under the laws of this State, and desist from all and singular its unlawful practices as charged in the information of the Attorney General, and from and after this day."

Thereupon and within ten days after the entry of the above judgment of ouster plaintiff in error duly filed its motion for a rehearing, which said motion is NOT set out in the transcript prepared by defendant in error and which is therefore set out herein as follows:

"IN THE SUPREME COURT OF MISSOURI

EN BANC.

RESPONDENT'S MOTION FOR REHEARING.

Now comes said respondent and respectfully moves this Honorable Court to grant it a rehearing herein, and assigns the following grounds herefor, to-wit:

First. The Court has inadvertently misconceived the scope and state of the pleadings: In this, that the petition charges a misuse and a nonuse of the privileges conferred on respondent by its charter. The answer denies generally the allegation as to nonuse, and then affirmatively by way of a further defense pleads that the plaintiff is estopped to ask a forfeiture of respondent's franchises, because of mere nonuse.

The judgment herein finds that the respondent has been guilty of abuse, misuse, perversion and nonuse of

its franchises. Under the state of the pleadings the respondent is entitled to a trial as to the question of abuse, misuse and perversion. There has been no trial on that issue so joined, yet a judgment without trial has been entered against respondent, thereby denying respondent the benefit of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

On the issues joined no judgment or ouster for mere nonuse could go further than to oust respondent of its franchise to hold fairs, and a fine of five thousand dollars for mere nonuse of a privilege conferred by a charter amounts to a cruel and unusual punishment within the meaning of Article VIII of the Amendment of the Constitution to the United States, which guarantee respondent here invokes.

Second. The respondent is charged with acts of misuse of its corporate franchises. To this charge respondent has interposed a general denial. No trial of this issue has been had, yet the Court has adjudged the respondent guilty without a trial and imposed a fine of five thousand dollars. This is not due process of law and violates the guarantees of the Fourteenth Amendment to the Constitution of the United States, which respondent here invokes.

Third. Respondent is charged with *nonuse* of its corporate franchises as to the right to hold fairs. The general denial of respondent applies to this charge, and there has been no trial as to that fact. *Yet the judgment adjudges the respondent guilty without a hearing, thereby also violating the Fourteenth Amendment to the Constitution of the United States.*

But, without this, the plea of estoppel interposed by the respondent to the charge of nonuse does not deprive

respondent of the benefit of its general denial of that charge. Even at common law, and certainly since the Statute of Anne, a plea of estoppel may be united with a general denial in a quo warranto proceeding.

Fourth. Respondent's attorneys in interposing the plea of estoppel relied upon the decision of this Court on demurrer (92 S. W. l. c. 190), and interposed that plea to meet the objections then stated by the Court to taking judicial notice of the facts pleaded. If counsel are in error in so pleading, that error was induced by the language of the Court in that opinion, and therefore respondent ought not to be prejudiced thereby, but should be permitted to withdraw, if necessary, the plea of estoppel and stand on the general denial.

Fifth. The judgment of ouster ought not to be entered in this case in the present state of the pleadings, for the reason that even though the power conferred by the charter of the respondent to engage in bookmaking and poolselling be regarded as taken away by the repeal of the Breeder's Law, and even though respondent has lost its charter privileges to conduct fairs by failure to exercise those privileges, nevertheless respondent has other privileges conferred by its charter which are not contrary to any law of this State or to the policy of the State, *and which have not been lost by nonuser,* among which privileges is the right to conduct horse races for prizes or purses or at pleasure, and which the judgment of this Court deprives respondent of without respondent having in any manner lost the right so to do, *and in this respect also the judgment deprives the respondent of its property without due process of law contrary to the guarantees of the Fourteenth Amendment to the Constitution of the United States, which respondent here invokes.*

Sixth. It has never been claimed in this proceeding even by the State that the answer admits any of the charges of misuse or abuse further than the registering of bets and the making of books prior to the repeal of the Breeder's Law. Such acts prior to that time were lawful acts under the laws of this State unless the State's contention that a corporation could not obtain a license under the Breeder's Law, although such a license might be conferred upon a natural person, be adopted as sound. That contention was rejected by this Court in its opinion filed in this cause (State ex rel. vs. Delmar Jockey Club, 92 S. W. 185), and was again rejected by this Court when advanced by the Attorney General in support of his motion to modify the ruling on the demurrer, and we cannot believe that your Honors would now take a different view of this question, destructive of the rights of the respondent, without at least an expression of an opinion showing wherein and for what reason the former ruling was unsound. If the Court erred in sustaining the first ground of the demurrer, the time to have corrected that error was on the motion to modify the decree when the Attorney General attacked the propriety of the Court's ruling on the same grounds, and on the same authorities that he now urges in support of judgment on the pleadings. Since the latter motion has been sustained by your Honors we have the incongruity of this Court at one stage of a case holding certain allegations insufficient to state an offense, and then the very next time the same case comes up for consideration, the Court finds respondent guilty and assesses final judgment against it for an alleged admission of the very charges which the Court had previously held stated no offense. It is certainly unfair to counsel who have drafted their pleadings on the faith of the former ruling, to have

their clients' interests sacrificed and its property confiscated, because the Court refuses to stand by its own opinion.

Respectfully submitted,

HENRY W. BOND,
THOMAS BOND,
Attorneys for Respondent."

And thereafter and on the 20th day of June, 1906, the above motion for rehearing was *sustained.* The judgment previously entered was set aside and *the case taken as submitted on the points asserted and raised by plaintiff in error in its said motion,* and thereafter and at the October Term, 1906, the Court after duly considering the points and the constitutional questions raised by plaintiff in error in its aforesaid motion for rehearing again rendered its judgment ousting respondent of all of its corporate powers and franchises and annulling its charter.

And thereafter plaintiff in error again moved the court for a rehearing, which said motion is set out in the transcript prepared by defendant in error on pages 28 to 31, and thereafter on the 18th day of December, 1906, said motion was overruled, whereupon plaintiff in error duly filed its assignments of error which are correctly set out on pages 34 to 39 inclusive in the transcript prepared by defendant in error, and duly sued out this writ of error to review and correct the judgment of the Supreme Court of Missouri denying the plaintiff in error the constitutional rights, privileges and immunities duly set up and claimed in its motion for a rehearing filed June 14th, 1906, and specifically set out in its assignments of error on which this writ was granted.

PROPOSITIONS OF LAW.

I.

Where a federal question appears in the record and was decided, or where a decision of such a question was necessarily involved in the case, it is not necessary that the particular section of the Constitution of the United States claimed to be violated be specifiically pointed out in the State Court, in order to confer jurisdiction upon the Supreme Court of the United States.

Murray vs. Charleston, 96 U. S. 432, 24 L. Ed. 760, l. c. 762;

Columbia Water & Power Co. vs. Columbia Electric Street Ry. & P. Co., 172 U. S. 475, l. c. 488;

Proprietors of Bridges vs. Hoboken L. & I. Co., 1 Wall 116;

Furman vs. Nichol, 8 Wall. 44;

Spencer vs. Merchant, 125 U. S. 345;

F. G. Oxley Steam Co. vs. Butler County, 166 U. S. 648, l. c. 657.

II.

Where jurisdiction is predicated upon the third class of controversies mentioned in R. S. U. S. Section 709, it is not necessary that the federal right, title, privilege or immunity claimed to be denied by the State Court be raised in the State Court by pointing out the particular section of the constitution claimed to be violated, or that it be set up by any particular form of words, but the requirement of

the statute is complied with if the record shows that the *attention* of the State Court was called to the right, title, privilege or immunity claimed.

Green Bay Miss. Canal Co. vs. Patten Paper Co., 172 U. S. 58, l. c. 68; 43 L. Ed. 364;

Dewey vs. Des Moines, 173 U. S. 193, l. c. 199; 43 L. Ed. 364;

San Jose Land & Water Co. vs. San Jose Ranch Co., 189 U. S. 175, l. c. 180;

Williams vs. Bruffy, 96 U. S. 176, 24 L. Ed. 716;

Harris vs. Dennie, 3 Pet. 292, 7 L. Ed. 683;

Eureka L. & Y. Canal Co. vs. Yuba Co., Supt. Ct. 116 U. S. 410, 29 L. Ed. 671;

III.

The federal rights, titles, privileges and immunities claimed by plaintiff in error herein and denied by the judgment of the Supreme Court of Missouri ousting it of all of its franchises for alleged nonuse, were specially and specifically set up, claimed, and called to the attention of the Supreme Court of Missouri in the motion for rehearing filed by plaintiff in error on June 14, 1905, and it was on the points raised in this motion that this cause was last submitted and was finally considered and decided by the court.

IV.

Federal questions raised in a motion for rehearing are not raised too late if the State Court sustains said motion, or considers the federal questions therein presented.

Mallett vs. North Carolina, 181 U. S. 589, l. c. 592; 45 L. Ed. 1015, l. c. 1018;

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291, l. c. 308, 309, 47 L. Ed. 480, l. c. 485.

V.

The constitutional rights, privileges and immunities set up by plaintiff in error in its motion for a rehearing filed after the entry of the first judgment of ouster were necessarily denied by the Supreme Court of Missouri in its final judgment ousting plaintiff in error of its corporate existence because of an alleged nonuser of certain of its corporate franchises.

Detroit, Ft. W. & B. I. R. Co. vs. Osborn, 189 U. S. 383;

Kaukauna W. P. Co. vs. Green Bay Wis. Canal Co., 142 U. S. 254.

ARGUMENT.

I.

The particular clause of the Constitution claimed to be violated need never be printed out in the State Court.

The jurisdiction of this court to review the judgments of the highest courts of the various statutes is based upon Section 709 of the R. S. of the U. S., which has in all of the later decisions of this court been construed to confer jurisdiction in three classes of controversies, to-wit:

First. Where the validity of a treaty or statute of or an authority authorized under the United States is drawn in question, and the decision of the State Court is against their validity.

Second. Where the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the constitutional laws or treaties of the United States is drawn in question, and the decision of the State Court is in favor of their validity.

Third. Where any right, title, privilege or immunity is *claimed* under the *constitution* or any treaty or statute of or any commission held or authority exercised under the United States, and the decision of the State Court is against the right, title, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority.

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291.

And the manner in which a federal question must be raised in order to entitle it to be reviewed by this court de-

pends upon whether it arises under the first, second or third of the above mentioned classes. If the federal right asserted be one arising under the first or second of the above classes, it will be reviewed by this court if it appears any where in the record that a federal question was decided or was necessarily involved in the decision of the State Court. But if the federal right be one claimed under the third class above mentioned then it must not only appear in the record as having been decided or as being necessarily involved in the decision in the State Court, but it must in some manner have been set up or claimed while the case was pending in the State Court.

Columbia Power, etc. vs. Columbia Electric, etc., 172 U. S. 457.

The Attorney General in his brief for defendant in error has cited a few of the earlier rulings of this court which apparently announce a different rule.

We refer to the statement on page 9 of his brief that a federal question is not presented in such manner as to give this court jurisdiction to review the final judgment of the State Court unless the particular section of the Constitution claimed to be violated was called to the attention of the State Court, and in support of this proposition he cites Farney vs. Towle, 66 U. S. 351; 1 Black 351, which was a writ of error to the Superior Court of the City of New York in which the error assigned was the action of the New York court in sustaining the validity of a statute claimed to be repugnant to that Article of the Constitution of the United States which declares that "no State shall pass any law impairing the obligations of contracts." That is to say, the jurisdiction was predicated on the *second* of the above mentioned classes. The writ of error was dismissed on the ground that the attention of the New York court had never been called to the particular clause of the Con-

stitution claimed to be violated by the State Law. This case has been since cited by this court in Columbia Light & Power, etc. vs. Columbia Electric Street Railway, Light & Power Co., 172 U. S. 475, where it was expressly held by this court that when the validity of a State statute is drawn in question on the ground that it is repugnant to the Constitution of the United States, this court has jurisdiction if the federal question appears any where in the record and was decided or a decision of it was necessarily involved in the decision rendered by the State Court. In so holding, this court said:

> "But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. Miller vs. Nicholls, 4 Wheat. 311 (4; 578); Wilson vs. Blackbird Creek Marsh Co., 2 Pet. 245 (7; 412); Satterlee vs. Matthewson, 2 Pet. 380, 410 (7; 458, 468); Fisher's Lessee vs. Cockrell, 5 Pet. 368 (9; 458); Harris vs. Dennie, 3 Pet. 292 (7; 683); Farney vs. Towle, 1 Black, 350 (17; 65); Mississippi & M. Railroad Co. vs. Rock, 4 Wall. 177 (18; 381); Furman vs. Nichol, 8 Wall. 44 (19; 370); Kaukauna Water Power Co. vs. Green Bay & M. Canal Co., 142 U. S. 254 (35; 1004)."

And the following cases are to the same effect:

Miller vs. Nicholls, 4 Wheat. 311;

Wilson vs. Blackbird, etc. Co., 2 Pet. 245;

Satterlee vs. Matthewson, 2 Pet. 380;
Harris vs. Dennie, 3 Pet. 292;
Miss. & M. R. R. Co. vs. Rock, 4 Wall. 177;
Furman vs. Nichol, 8 Wall. 44;
Columbia L. & P. Co. vs. Col. El. St. Ry. L. & P. Co., 172 U. S. 475;
Chi., B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226;
Powell vs. Supervisors of Brunswick Co., 150 U. S. 440;
Kaukauna W. P. Co. vs. Green B. & M. Co., 142 U. S. 254;
Hickie vs. Starke, 1 Pet. 94;
Proprietors of Bridges vs. Hoboken L. & P. Co., 1 Wall. 116;
Yazoo & M. V. R. Co. vs. Patten Paper Co., 172 U. S. 58.

And on the authority of these cases we submit that it is no longer necessary to expressly point out in the State Court the particular section or clause of the Constitution violated, but that under all the recent rulings of this court a federal question is presented if the record show that it was decided by the State Court or was necessarily involved in its decision, and that if the federal right asserted arise under the *third* of the above mentioned classes the *attention* of the State Court was in some manner called to it while the case was pending therein.

II.

Nor is it necessary where, as in this case, the jurisdiction is based on the third class of controversies, supra, that the constitutional rights or immunities relied upon be specially set up in any prescribed manner, or in any particular words, but it is sufficient to confer jurisdiction on this court if it appears that such rights were in some manner called

to the attention of the State Court and were considered or necessarily denied by said court in rendering its judgment.

This was expressly held to be the law in Green Bay and Mississippi Canal Co. vs. Patton Paper Co., 172 U. S. 58, l. c. 68, where the Court speaking through Mr. Justice Shiras said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the *attention* of that court.
>
> 'The true and rational rule,' this court said Bridge Proprietors vs. Hoboken Land & Improv. Co., 1 Wall. 143 (17:576), 'is that the court must be able to see clearly from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In Roby vs. Colehour, 146 U. S. 159 (36:922), it was said that our jurisdiction being invoked, upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case, either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment. 'If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.' Powell vs. Brunswick County, 150 U. S. 440 (37:1137); Sayward vs. Dennie, 158 U. S. 180 (39:941); Chicago, Burling-

ton & Q. R. R. Co. vs. Chicago, 166 U. S. 226 (41:979)."

And in Dewey vs. Des Moines, 173 U. S. 193. The case just cited was affirmed and the rule reiterated by Mr. Justice Peckham on page 199 where the court said:

> "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its *attention* to the Federal question as one that was relied on by the party, and then, if the decision of the court, *while not noticing the question,* was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. Robt vs. Colehour, 146 U. S. 153 (36:922, 924); Chicago, B. & Q. Railroad Company vs. Chicago, 166 U. S. 226, 231 (41:979, 983); Green Bay & M. Canal Company vs. Patten Paper Company, and Bank of Lincoln vs. Bank of Candiz, *supra.*"

And in San Jose Land and Water Company vs. San Jose Ranch Co., 189 U. S. 175, l. c. 180, this court in a very recent opinion held that a federal question sufficiently appeared where it had been insisted upon in the argument in the State Court. In so holding and after overruling earlier cases to the contrary this court said:

> "While the right under the act of 1887, thus considered, was not originally specially set up and claimed by the plaintiff inasmuch as it was not an original right, but a right available in rebuttal of the defense,

it is one which appears to have been insisted upon in the argument and under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the court and ruled against the plaintiff in error. Murdock vs. Memphis, 20 Wall. 590, 633, 22 L. Ed. 429, 443; Gross vs. United States Mortg. Co., 108 U. S. 477, 27 L. Ed. 795, 2 Sup. Ct. Rep. 940; Fire Asso. of Philadelphia vs. New York, 119 U. S. 110, 115, 30 L. Ed. 342, 345, 7 Sup. Ct. Rep. 108; Egan vs. Hart, 165 U. S. 188, 41 L. Ed. 680, 17 Sup. Ct. Rep. 300; Sayward vs. Denny, 158 U. S. 180, 184, 39 L. Ed. 941, 942, 15 Sup. Ct. Rep. 777; Mallett vs. North Carolina, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730."

As the result of the above and numerous similar rulings of this Honorable Court we submit that if it appear any where in the record that the Federal rights, privileges, and immunities claimed, were called to the ATTENTION of the Supreme Court of Missouri, and if that court while refusing to notice such claim, rendered a judgment which necessarily denied the claim, then a Federal question is presented and the motion to dismiss must be overruled.

III.

Federal questions raised in a motion for rehearing are not raised too late if the State Court SUSTAINS SAID MOTION OR CONSIDERS *the federal questions therein raised.*

Mallet vs. North Carolina, 181 U. S. 589, 45 L. Ed. 1015.

In this case it appeared that the Federal question was never formally presented to the North Carolina Court, but

that after the North Carolina Court had rendered its opinion the defendants filed a motion for rehearing which the court entertained and considered and overruled. On these facts this court held:

> "It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under state laws. But the record discloses that, after that opinion had been filed, but before it had been certified down, the defendants filed a petition for reargument, and presented the Federal questions on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss, numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in the Supreme Court of a State after that court has pronounced its final decision. Loeber vs. Schroeder, 149 U. S. 580, 37 L. Ed. 856, 13 Sup. Ct. Rep. 934; Sayward vs. Denny, 158 U. S. 183, 39 La. Ed. 942, 15 Sup. Ct. Rep. 768; Pim vs. St. Louis, 165 U. S. 273, 41 L. Ed. 714, 17 Sup. Ct. Rep. 322.
>
> But those were cases in which the Supreme Court of the State *refused* the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record."

The above case cannot be distinguished from the case at bar. In this case plaintiff in error had no opportunity

to present any constitutional questions or to claim any constitutional rights until the Supreme Court of Missouri sustained the motion for judgment on the pleadings. Whereupon plaintiff in error immediately filed its motion praying for a rehearing and setting out specifically and in detail the constitutional rights and immunities claimed. This motion was sustained by the court, the cause was taken as resubmitted and in entering its second judgment ousting plaintiff in error of all of its corporate franchises and privileges for an alleged nonuser of its franchises, the court necessarily denied the constitutional rights and immunities claimed by plaintiff in error in the third and fifth grounds of its motion for rehearing, which were as follows:

> "Third. Respondent is charged with *nonuse* of its corporate franchises as to the right to hold fairs. The general denial of respondent applies to this charge, and there has been no trial as to that fact. *Yet the judgment adjudges the respondent guilty without a hearing, thereby also violating the Fourteenth Amendment to the Constitution of the United States.*"

> "Fifth. The judgment of ouster ought not to be entered in this case in the present state of the pleadings, for the reason that even though the power conferred by the charter of the respondent to engage in bookmaking and poolselling be regarded as taken away by the repeal of the Breeder's Law, and even though respondent has lost its charter privileges to conduct fairs by failure to exercise those privileges, nevertheless respondent has other privileges conferred by its charter which are not contrary to any law of this State or to the policy of the State, *and which have not been lost by nonuser*, among which privileges is the right to conduct horse races for prizes or purses or at pleasure, and which the judgment of this Court

deprives respondent of without respondent having in any manner lost the right so to do, *and in this respect also the judgment deprives the respondent of its property without due process of law contrary to the guarantees of the Fourteenth Amendment to the Constitution of the United States, which respondent here invokes.*"

It thus plainly appears that at the time this cause was last submitted, plaintiff in error specifically set up in the Supreme Court of Missouri that it could not be ousted of its franchises for *nonuse* without a violation of the Fourteenth Amendment to the Constitution of the United States. And when notwithstanding such claim the Missouri court proceeded to render judgment of ouster against plaintiff in error for nonuse it necessarily denied the rights and immunities claimed by plaintiff in error under the Fourteenth Amendment to the Constitution of the United States and specially set up in the above quoted paragraphs in its first motion for a rehearing.

CONCLUSION.

In conclusion we desire to notice certain statements contained in the brief of defendant in error. In the first paragraph of his argument the learned Attorney General disposes of the first motion for a rehearing with the statement that it cannot be considered as presenting a Federal question, because it was sustained, and another and different judgment rendered, and then he proceeds to discuss the second motion for a rehearing, in which plaintiff in error made no attempt to reiterate the Federal rights and immunities which it had previously set up and specifically called to the attention of the Missouri Court. The facts as

appear from the record and set out in the forepart of this brief are that there were two judgments entered in this case while it was pending in the Supreme Court of Missouri and two motions for a rehearing filed. The first judgment was entered June 1st, 1906, and ousted plaintiff in error of all its franchises for *misuse, abuse, and nonuse*, and imposed a *fine of* $5,000.00. Whereupon plaintiff in error, on, to-wit: June 14th, 1906, filed its *first* motion for a rehearing claiming that upon the record no judgment could be entered against it for *misuse or abuse* without denying it due process of law as guaranteed in the Fourteenth Amendment to the Constitution of the United States; that upon the record the *fine* imposed upon it was a cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution of the United States; that upon the record no judgment of ouster could be entered against it for *nonuse* without denying it due process of law and without violating the guarantees contained in the Fourteenth Amendment to the Constitution of the United States. (See Third and Fifth Grounds of Motion, *supra.*) This motion was sustained, the judgment ousting and fining plaintiff in error for misuse, abuse and nonuse were set aside and the cause taken as re-submitted on the propositions set up in the motion for rehearing, and thereafter without expressly noticing or deciding the constitutional rights and immunities claimed, the court on November 22, 1906, again rendered judgment against plaintiff in error ousting it of all its franchises on the sole ground of an inferred *nonuse* of certain of its corporate powers. And therefore it is perfectly apparent on the face of the record that as plaintiff in error had previously claimed that no judgment could be entered against it on the ground of *nonuse* without denying

it the protection of the Fourteenth Amendment to the Constitution of the United States, in undertaking to enter such a judgment, the Supreme Court of Missouri necessarily denied plaintiff in error the constitutional rights and immunities which it had previously and expressly called to the attention of the court.

Now after the rendition of the above judgment plaintiff in error on November 29th, 1906, filed a second motion for rehearing and this is the motion which is accorded so much consideration in the brief of defendant in error. We submit, however, that as this second motion was neither sustained nor considered by the court, it is wholly immaterial whether it does or does not contain a Federal question. The proper time to claim constitutional rights and immunities is not after but *before* the final judgment of the State Court, and this we did in the motion for rehearing filed in June, 1906, and in which we expressly claimed constitutional rights and immunities that were necessarily denied by the final judgment of the Missouri Court.

We notice that a motion to affirm is coupled with the motion to dismiss. The motion to affirm, however, does not seem to be seriously insisted upon. At least it is not mentioned by the learned Attorney General in his brief and argument. We think it apparent, however, that the drastic judgment of the Supreme Court of Missouri destroying without a trial or a hearing and by an unequal and unjust enforcement of the law, vested property rights both of plaintiff in error and its stockholders, in the face of Federal immunities which the record shows to have been specially set up and claimed, does not present a question so frivolous as to warrant the court in affirming it without a hearing, and hence having pointed out, as we believe, that important and fundamental constitutional rights and immunities were

denied to us by the State of Missouri, we will defer consideration of the question as to whether they were properly or improperly denied until the cause is reached for hearing on the regular call of the docket.

Respectfully submitted,

Henry S. Bond

Thomas Bond

Attorneys for Plaintiff in Error.

FILED.
MAR 30 1908
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

DELMAR JOCKEY CLUB (a Corporation),
Plaintiff in Error,
vs.
STATE OF MISSOURI, on the Relation of the ATTORNEY-GENERAL,
Defendant in Error.
No. 219.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

HENRY W. BOND,
THOMAS BOND,
Attorneys for Plaintiff in Error.

St. Louis Law Printing Co., 311-315 Locust. Bell, Main 1819; Kinloch, Central 986 L.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

DELMAR JOCKEY CLUB (a Corporation),
Plaintiff in Error,
vs.
STATE OF MISSOURI, on the Relation of the ATTORNEY-GENERAL,
Defendant in Error.
No. 219.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

Plaintiff in error is a corporation duly organized and incorporated on the 18th day of June, 1901, under the laws of the State of Missouri, with a capital stock of $100,000.00, and endowed by the State with the following franchises and powers:

"The purposes for which this corporation is formed, are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses and other rewards and otherwise; to establish and maintain suitable Fair Grounds, and a race track in the City and County of Saint Louis with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track public exhibitions of agricultural products and stock, and of speed, or races, between horses for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto, and to said grounds and track, to engage in pool selling, book making and registering bets on exhibitions of speed or races at the said race track and premises, as provided by law and to let the right to others to do the same; to conduct restaurants, cafes, and other stands for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

At the April Term, 1905, of the Supreme Court of Missouri, the Attorney-General of the State of Missouri, filed an *ex-officio* information in the nature of a *quo warranto*, seeking to annul the charter of plaintiff in error and to forfeit all of its franchises and property, for the following alleged acts of abuse, mis-use and non-use of its corporate powers and privileges:

First. Engaging in book making, pool selling and the registration of bets from the day of its incorporation up to the 16th day of June, 1905.

Second. Engaging in book making, pool selling and the registration of bets with minors, from the day of its incorporation up to the 16th day of June, 1905.

Third. Engaging in book making, pool selling and the registration of bets since June 16th, 1905, in violation of the Act of the Legislature of Missouri, approved March 21, 1905.

Fourth The alleged failure on the part of plaintiff in error to exercise its permissive franchise to give agricultural exhibitions in the City or County of St. Louis or elsewhere.

To this information, which is set out on page 3 of the Printed Record, plaintiff in error filed its demurrer (Printed Record, page 10) which is as follows, to-wit:

"The respondent now comes and says that the information filed herein is insufficient in law, and that it ought not to be required to answer the same; and the respondent further says that the said information is so insufficient in this:

1. That the portion, which relates to acts of book making, pool selling and registration of bets described as the business carried on by the respondent from January 18, 1901, to June 16, 1905, does not state violations of law, because such acts were lawful, there being no averment that the defendant was not licensed to do such acts.

2. That portion which alleges that the respondent during such period 'sold pools and accepted and registered bets from minors' does not state violations of law, because it is not alleged that the respondent knew that the persons whose bets were registered were minors, and there is no averment that the respondent was licensed to sell pools or register bets.

3. That portion which relates to acts of book making and registering bets and to acts of permission to others to make books or register bets, and to keeping and using devices for recording bets, after June 16, 1905, does not state violations of law, because a corporation cannot commit a felony, or felonies, and the offense of book making,

pool selling, or registering bets and the like is denounced a felony by the statutes of this State.

4. That the information does not state any facts upon which a judgment of ouster could lawfully be based, for the obvious reason, that to violate a criminal statute is not the usurpation, or misuser of a franchise, there being a marked difference between franchises and felonies or misdemeanors, and *quo warranto* will not lie to compel the observance of a criminal statute, or to punish its violation.

5. The information neither alleges nor charges that the stockholders of the defendant corporation directed or authorized its alleged officers to violate the criminal laws of the State or to commit the felonies charged in said information.

6. The information neither alleges nor charges that any of the officers or agents of said corporation have been prosecuted under indictment or upon verified information for the felonies charged therein, and have been after trial found guilty thereof, but seeks to have this honorable court convict certain persons of the felonies charged in said information without the intervention of constitutional methods, and in a manner unknown 'to the law of the land'.

7. That said information shows on its face that it seeks to deprive the stockholders of said corporation of their property without due process of law and without due conviction of any of the agents and officers of said corporation of the felonies imputed to it in said information.

8. Because said information seeks to have this Court adjudge specific persons to be guilty of felonies without the aid of a prior indictment or verified information charging such offenses, and without trial by jury, as guaranteed in the Constitution of the State.

9. That the act of the General Assembly, entitled 'An Act prohibiting book making and pool selling

and prescribing a penalty therefor', approved March 21, 1905, is void, because it violates Section 28 of Article IV of the Constitution, in that it contains two subjects, to-wit: The prohibition of book making and the prohibition of pool selling, which are two distinct subjects-matter, which have no relation to each other, and are not germane.

Wherefore, the defendant prays judgment, etc.

(Signed) CHESTER H. KRUM,
BOND & BOND,
For Respondent."

Thereupon, at the October Term, 1906, after hearing argument and considering briefs, the Supreme Court of Missouri, in its opinion reported in 92 Southwestern, page 185, Printed Record, page 13, sustained the first ground of said demurrer and overruled all the others, and granted plaintiff 15 days in which to answer what was left of the information, to-wit:

Second. Engaging in book making, pool selling and the registration of bets with minors, from the day of its incorporation up to the 16th day of June, 1905.

Third. Engaging in book making, pool selling and the registration of bets since June 16, 1905, in violation of the Act of Legislature of Missouri, approved March 21, 1905.

Fourth. The alleged failure on the part of plaintiff in error to exercise its permissive franchises to give agricultural exhibitions in the City or County of Saint Louis or elsewhere.

Thereupon and within said 15 days plaintiff in error duly filed its answer, which said answer is as follows (Printed Record, page 24):

"Respondent, Delmar Jockey Club, comes by its attorneys and for its answer to the information of

the attorney general herein, admits that it is a corporation duly organized and incorporated under the laws of the State of Missouri, and denies each and every other allegation in said information alleged or contained.

Wherefore respondent prays that it be hence discharged with its costs.

II.

For its further answer to that portion of the information of the Attorney-General herein, where it is alleged that respondent has failed to exercise certain franchises claimed to be possessed by it, this respondent states that it has fully carried out and exercised all those provisions in its charter authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed and and races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and has provided suitable fair grounds for the same, in this that between the 18th day of January 1901, and the 16th day of June, 1905, in pursuance of the provisions and requirements of Section 7419 to 7424 inclusive, Revised Statutes of Missouri, 1899, respondent duly paid large sums of money into the treasury of the State of Missouri which were placed by the Treasurer of the State of Missouri to the credit of the State Fair Fund, the same being a fund created by Section 7424 Revised Statutes of Missouri, 1899, for the development and advancement of the industrial interests of this State under the direction of the State Board of Agriculture, and that all of said money so paid into said fund was received, used and appropriated by the State of Missouri for the purpose of holding and giving annual exhibitions of agricultural products and stock of every kind and description at the City of Sedalia, State of Missouri, and that the said sums of money paid by respondent into the Treasury of the State of Missouri under the terms of Section 7419 to 7424 inclusive, were used and appropriated

by the said State of Missouri and its said State Board of Agriculture solely for the maintenance and support of said Missouri State Fair held annually at Sedalia, Missouri, and for the further purposes of providing, constructing, improving and equipping all grounds, stands and buildings necessary for the holding and giving of said fair.

Respondent further states that by exacting and receiving the said sums of money for the above mentioned purposes, the said State of Missouri intended to and did accept the same as full and complete performance and use by respondent of its franchise to give exhibitions of agricultural products and stock, and the said State of Missouri thereby intended to and did waive any other or further exercise of such franchise on the part of respondent.

Further answering the allegations of non-user from June 16th, 1905, to the date of the filing of this information, to-wit: July 28th, 1905, respondent states that the franchise of giving exhibitions of agricultural products and stock is not one which can be exercised continuously and at all times from the beginning to the end of the year, but is one, owing to its peculiar character, which can only be exercised during the harvest season of each year. For these reasons, respondent was not required to exercise such franchise between the above specified dates, but respondent further avers that it has in good faith endeavored at all times to exercise such franchises granted to it by its articles of incorporation in the manner and for the purposes intended by such grants, and that such is its purpose in the future, and respondent intends in every way to comply with and perform according to law all the obligations which it assumed upon the grant of the aforesaid franchises to it by the State of Missouri, and respondent again specifically denies each and every charge, allegation or assertion of a contrary purpose on its part, contained in the information filed herein.

Wherefore, respondent prays that it be hence discharged with its costs.

BOND & BOND,
C. H. KRUM,
Attorneys for Respondent."

Thereupon defendant in error filed its motion for judgment on the pleadings, which said motion is as follows (Printed Record, pages 26–27):

"Comes now Herbert S. Hadley, Attorney-General of the State of Missouri, who in this behalf prosecutes for the State, and moves the Court for judgment on the return and answer of respondent herein, for the following reasons:

First. That said return and answer fails to state facts showing any sufficient cause or excuse, or any legal defense to, the non-user of respondent's franchises authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed or races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and for the establishing and maintaining of suitable fair grounds in the City and County of St. Louis, as set forth and charged in the information herein.

Second. It appears from the facts stated in said return and answer, and the second count thereof, that respondent is guilty of the acts of mis-user and abuser of its franchises charged in the information herein filed, in this, to-wit, that respondent engaged in the business of book making and pool selling, registration of bets and the acceptance of bets in violation of the laws of this State.

Wherefore, informant prays that final judgment of ouster be rendered against the respondent as prayed for in the information in this case."

And thereafter, the case having been submitted to the Court on the information, answer and the motion,

said motion was sustained and judgment of ouster was entered by the Supreme Court of Missouri on the 1st day of June, 1906, ousting plaintiff in error of all of its franchises and imposing upon it a fine of $5,000.00 because of an alleged non-use, mis-use, perversion and violation of its franchises (Printed Record, pages 29 and 30).

Thereupon plaintiff in error duly filed its motion for a rehearing, which said motion is as follows (Printed Record, pages 31 to 33):

"In the Supreme Court of Missouri
En Banc.
Respondent's Motion for Rehearing.

Now comes said respondent and respectfully moves this Honorable Court to grant it a rehearing herein, and assigns the following grounds herefor, to-wit:

First. The Court has inadvertently misconceived the scope and state of the pleadings; in this, that the petition charges a mis-use and a non-use of the privileges conferred on respondent by its charter. The answer denies generally the allegation as to mis-use, as well as the allegation as to non-use, and then affirmatively by way of a further defense pleads that the plaintiff is estopped to ask a forfeiture of respondent's franchises, because of mere non-use.

The judgment herein finds that the respondent has been guilty of abuse, mis-use, perversion and non-use of its franchises. Under the state of the pleadings the respondent is entitled to a trial as to the questions of abuse, mis-use and perversion. There has been no trial on that issue so joined, yet a judgment without trial has been entered against respondent, thereby denying respondent the benefit of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

On the issues joined no judgment or ouster for mere non-use could go further than to oust re-

spondent of its franchises to hold fairs, and a fine of five thousand dollars for mere non-use of a privilege conferred by a charter amounts to a cruel and unusual punishment within the meaning of Article VIII of the Amendment to the Constitution of the United States, which guarantee respondent here invokes.

Second. The respondent is charged with acts of mis-use of its corporate franchises. To this charge respondent has interposed a general denial. No trial of this issue has been had, yet the Court has adjudged the respondent guilty without a trial and imposed a fine of five thousand dollars. This is not due process of law and violates the guarantees of the Fourteenth Amendment to the Constitution of the United States, which respondent here invokes.

Third. Respondent is charged with **non-use** of its corporate franchises as to the right to hold fairs. The general denial of respondent applies to this charge, and there has been no trial as to that fact. **Yet the judgment adjudges the respondent guilty without a hearing, thereby also violating the Fourteenth Amendment to the Constitution of the United States.** But, without this, the plea of estoppel interposed by the respondent to the charge of non-use does not deprive respondent of the benefit of its general denial of that charge. Even at common law, and certainly since the Statute of Anne, a plea of estoppel may be united with a general denial in a *quo warranto* proceeding.

Fourth. Respondent's attorneys in interposing the plea of estoppel relied upon the decision of this Court on demurrer (92 S. W., *l. c.* 190), and interposed that plea to meet the objections then stated by the Court to taking judicial notice of the facts pleaded. If counsel are in error in so pleading, that error was induced by the language of the Court in that opinion, and therefore respondent ought not to be prejudiced thereby, but should be

permitted to withdraw, if necessary, the plea of estoppel and stand on the general denial.

Fifth. The judgment of ouster ought not to be entered in this case in the present state of the pleadings, for the reasou that even though the power conferred by the charter of the respondent to engage in book making and pool selling be regarded as taken away by the repeal of the Breeder's Law, and even though respondent has lost its charter privileges to conduct fairs by failure to exercise those privileges, nevertheless respondent has other privileges conferred by its charter which are not contrary to any law of this State or to the policy of the State, **and which have not been lost by non-user,** among which privileges is the right to conduct horse races for prizes or purses or at pleasure, and which the judgment of this Court deprives respondent of without respondent having in any manner lost the right so to do, **and in this respect also the judgment deprives the respondent of its property without due process of law contrary to the guarantee of the Fourteenth Amendment to the Constitution of the United States, which respondent here invokes.**

Sixth. It has never been claimed in this proceeding even by the State that the answer admits any of the charges of mis-use or abuse further than the registering of bets and the making of books prior to the repeal of the Breeder's Law. Such acts prior to that time were lawful acts under the laws of this State unless the State's contention that a corporation could not obtain a license under the Breeder's Law, although such a license might be conferred upon a natural person, be adopted as sound. That contention was rejected by this Court in its opinion filed in this cause (State *ex rel.* v. Delmar Jockey Club, 92 S. W. 185), and was again rejected by this Court when advanced by the Attorney-General in support of his motion to modify the ruling on the demurrer, and we cannot believe that your Honors would not take a different view

of this question, destructive of the rights of the respondent, without at least an expression of an opinion showing wherein and for what reason the former ruling was unsound. If the Court erred in sustaining the first ground of the demurrer, the time to have corrected that error was on the motion to modify the decree when the Attorney-General attacked the propriety of the Court's ruling on the same grounds, and on the same authorities that he now urges in support of judgment on the pleadings. Since the latter motion has been sustained by your Honors we have the incongruity of this Court at one stage of a case holding certain allegations insufficient to state an offense, and then the very next time the same case comes up for consideration, the Court finds respondent guilty and assesses final judgment against it for an alleged admission of the very charges which the Court had previously held stated no offense. It is certainly unfair to counsel who have drafted their pleadings on the faith of the former ruling, to have their clients' interests sacrificed and its property confiscated, because the Court refused to stand by its own opinion.

Respectfully submitted,

HENRY BOND,

THOMAS BOND,

Attorneys for Respondent."

And thereafter and on the 12th day of June, 1906, the above motion for a rehearing was **sustained,** the judgment previously entered was set aside, and the case taken as submitted on the points asserted and and raised by plaintiff in error in its said motion, and thereafter and at the October Term, 1906, the Court after duly considering the points, and the Constitutional questions raised by plaintiff in error in its aforesaid motion for a rehearing, again entered judgment ousting plaintiff in error of all of its corporate powers and franchises, because of an alleged **non-use** of an incidental or collat-

eral franchise, to-wit: the franchise to give agricultural exhibitions. Which said judgment is as follows (Printed Record, page 34):

"STATE OF MISSOURI EX INFORMATIONE HERBERT S. HADLEY, ATTONEY-GENERAL, INFORMANT.
vs.
DELMAR JOCKEY CLUB, A CORPORATION, RESPONDENT.

QUO WARRANTO.

"And now on this day, come again the parties by their respective attorneys, and the motion of the Attorney-General for judgment of ouster upon the pleadings heretofore filed and argued, coming on for final judgment, and it now appearing to the Court, that heretofore, to-wit, on the 22nd day of December, 1905, the demurrer of the respondent to the information of the Attorney-General, was overruled as to all the grounds of said demurrer save and except as to the first ground therein specified, and leave was granted respondent to plead over to said information, within fifteen days thereafter, and it further appearing that within the time allowed the respondent herein filed its answer to said information and the Attorney-General on January 24th, 1906, filed his motion for judgment upon the pleadings notwithstanding said answer and the said motion has been fully argued and submitted to the Court, it is now considered, ordered and adjudged by the Court that the answer of the said Delmar Jockey Club, respondent herein, is not sufficient in law and the said respondent has not avoided the cause of action in the Attorney-General's information stated, and that judgment of ouster from the franchises heretofore granted respondent in its articles of incorporation, by the State of Missouri, ought to be given to the State of Missouri for the **non-use** of said franchises, notwithstanding its said answer, and it is therefore considered, ordered and adjudged by the Court that

the said Delmar Jockey Club, respondent herein, has failed to show any good and lawful reason for the **non-use** of the franchises granted to it by the State, as charged in the information of the State of Missouri by the Attorney-General, and it is accordingly considered and adjudged that it be and is hereby ousted of all the rights, franchises and privileges granted to it by the State in its articles of incorporation, and that it pay the costs of this proceeding and that said corporation be dissolved. It is further considered, ordered and adjudged that the President and Board of Directors of said Delmar Jockey Club, after satisfying the costs heretofore and herein adjudged, proceed at once to wind up and settle the affairs, collect the outstanding debts and divide, and distribute the moneys and other property of said Delmar Jockey Club among the stockholders after paying the debts due and owing by such company at the date of its dissolution, and do and perform all other duties devolving upon them as trustees therefor, as provided in Section 976, R. S. of Missouri, 1899, and desist from all further exercise of any and all franchises heretofore granted to said Delmar Jockey Club by virtue of its incorporation under the laws of this State, from and after this day, and that execution issue therefor. (Opinion filed.)''

After an unsuccessful motion for a rehearing, plaintiff in error duly filed its assignments of error (Printed Record, page 47) and duly sued out this writ of error to review and correct the judgment of the Supreme Court of Missouri, denying the plaintiff in error the constitutional rights, privileges and immunities duly set up, and claimed in its motion for a rehearing filed June 14, 1906, and to reverse the above judgment, which deprives it and its stockholders of property without due process of law.

SPECIFICATION OF ERRORS.

I.

An *ex officio* information, in the nature of a *quo warranto*, filed by the Attorney-General, by virtue of his office, and without leave of Court, is governed by the rules of the common law, and under the common law system of pleading the parties in this case were at issue, and were entitled under the Constitution to a trial of that issue, and in rendering judgment without trial, the Supreme Court of Missouri denied to plaintiff in error "a day in court", and deprived it and its stockholders of their property without "due process of law".

II.

The record in this case amounts in effect to a charge, a denial of the charge, and a plea of estoppel. There is no admission, express or implied, of any part of the charges made in the information. A judgment entered on such a record without trial, is a denial of due process of law, and is no less so, because the Court rendering it is pleased to call that an admission, which plainly does not admit anything.

III.

If it could be held, which the record contradicts, that plaintiff in error, by its answer, inferentially admitted a non-use of its minor franchise, to give agricultural exhibitions, still the Court could not render judgment of ouster for that reason of other valuable and principal franchises which were lawfully exercisable under the charter.

IV.

The Court erred in ousting plaintiff in error from the exercise of **ALL** of its franchises for the non-use of one. The most that the State could do, where there has been a non-use of one of the franchises granted to a corporation, is to take away the franchise, the use of which has been neglected. To attempt for such non-use, to forfeit other franchises, as to which there is no claim of non-user, is to take property without due process of law, and denies to the plaintiff in error the equal protection of the law.

V.

The judgment of the Supreme Court of Missouri deprives plaintiff in error and its stockholders of property without due process of law, and denies to plaintiff in error the equal protection of the law.

PROPOSITIONS OF LAW.

I.

Whether or not, the answer is sufficient to raise an issue of fact, must be determined according to the rules of pleading as they existed at common law.

State *ex. inf.* v. Bechner, 160 Mo., *l. c.* 86;
Brief of Attorney-General in this cause on demurrer, page 12; and brief of Attorney-General in this cause in support of his motion for judgment on the pleading, page 16, where this proposition is conceded.

II.

It was always the rule at common law from the earliest times, that pleas by way of estoppel constituted an exception to the rule against duplicity, and it was never considered double pleading for a defendant to set up in his plea, matter in estoppel along with the general issue or other defense in bar.

Martin on Civil Procedure at Common Law, Section 303.

III.

By the Statute of Anne, the rule against duplicity was abolished in so far as it related to the defendant's pleading in chief, *i. e.* his plea. And after the enactment of this Statute, a defendant might set up in his plea, as many consistent defenses as he had.

Martin on Civil Procedure at the Common Law, Section 317.

IV.

Whether the new matter pleaded in the answer be or be not sufficient in law to amount to an estoppel, it was

clearly **not an admission** of anything, and the general denial, pleaded in the first count of the answer to the entire information raised an issue, which, according to every charter of liberty from the magna charter down, plaintiff in error was entitled have tried before it was convicted.

Art. 14 of the Amend. of the Const. of U. S.
" 5 " " " " " " " " " "

V.

No corporation is required to exercise all the powers granted to it as a condition to the exercise of any of them.

Cyc. of Law & Procedure, Vol. 10, p. 1082, Subdivision C *et* cases cited;
Wardesboro Cotton Mills v. Burns, 114 N. Car. 353, *l. c.* 356.

VI.

The non-user of one franchise granted to a corporation does not warrant the forfeiture of other franchises granted to the corporation, unless all of its franchises were granted only upon the condition expressed in the charter or by law, that it should use the particular franchise as to which non-user is alleged. In short, in order to warrant the forfeiture of a franchise for non-user, the non-user must be willful, and the franchise not used must be of the essence of the contract.

Ill. Trust and Sav. Bk. v. Doud, 105 Fed 123; 44 C. C. A. 389; 52 L. R. A. 481, *l. c.* 485;
State *ex rel.* v. Wood, 13 Mo. App. 142;
State *ex rel.* v. Societe Republicain 9 Mo. App. 114, *l. c.* 119;
Attorney-General v. Bank of Niagara, 1 Hopkins Ch. Rep. (N. Y.) 354, *l. c.* 360 and 361;

People v Williamson Turnpike, 47 N. Y. 586;
People v. Crystal Turnpike, 23 Wendell 222;
People v. Brystol, 23 Wendell, 236;
People v. Kingston, Turnpike Road, 23 Wendell 193;
Female Seminary v. State, 9 Gill, 379;
Pascall v. Whitsett, 11 Ala. 472;
Att'y-Gen. v. Petersburg R. R., 6 Ired. 456.

VII.

The franchise to give agricultural exhibitions was purely incidental and collateral to the **main purpose** for which plaintiff in error was incorporated, to-wit, "The improvement of stock, by giving exhibitions of contests of speed in races between horses for premiums, purses and other awards and otherwise." And the mere non-user of the franchise to give agricultural exhibitions, is not sufficient to warrant the forfeiture of the entire charter.

See cases cited under Proposition 6, *supra*.

VIII.

The most that the State can do, where there has been non-user by the corporation of a granted franchise, or the usurpation of an ungranted one, is to oust the corporation from further use of the franchise thus neglected or usurped. The forfeiture of other franchises which have not been neglected or usurped is confiscation, and amounts to a denial of due process of law.

Am. & Eng. Enc. of Pleadings & Practice, Vol. 17, page 482, Sec. 2;
State *ex inf.* v. Lincoln Trust Co., 144 Mo. 562, *l. c.* 569.

IX.

Due process of law and the law of the land are synonymous, and may be defined as follows:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land".
>
> (Argument of Daniel Webster in the Dartmouth College case).
>
> Cooley Constitutional Limitation, 6 Ed., p. 431;
> State v. Julow, 129 Mo. 163, *l. c.* 174.

X.

The rights guaranteed by the Fourteenth Amendment may be, and often are, as effectually denied by a **judgment** of a court, as by a legislative enactment.

> C. B. & Q. R. R. Co. v. Chicago, 166 U. S. 226;
> 41 Lawyers Ed., 979 *l. c.* 983–984;
> 30 Lawyers Ed., 220;
> Yickwo v. Hopkins, 118 U. S. 356;
> Ah Sin v. Wittman, 198 U. S. 500;
> Lawyers Ed., 1152.

ARGUMENT.

Where the pleadings raise an issue of fact, a judgment entered without trial is a denial of due process.

As the judgment of the Missouri Court ousts plaintiff in error of all of its powers and franchises, because of an alleged admission in the plaintiff in error's answer, that the said plaintiff in error has failed to use for a period of four years that franchise contained in its charter, authorizing it to hold agricultural exhibitions in the City or County of Saint Louis, and since it is the contention of plaintiff in error in this proceeding, that the entry of such a judgment amounts of itself to a violation of the rights, guaranteed in the 14th Amendment, it is important at the outset to inquire into the condition of the record at the time this judgment was entered, and also to determine by what law, the pleadings in this proceeding were governed.

This is not a proceeding by a public officer or individual under the statutes of Missouri relating to *quo warranto* proceedings, but is an *ex officio* information in the nature of a *quo warranto*, filed by the Attorney-General in the Supreme Court of Missouri, not by virtue of any statute, but by virtue of his office as the chief prosecuting officer of the State, and without leave of Court, and as such under the settled law, it is a proceeding, the pleadings in which are governed by the rules of the common law, and **not** by the Missouri Code. This has been expressly held to be the law by the Supreme Court of Missouri in State *ex inf.* v. Bechner, 160 Mo. 86, where the Court said:

> "The Vallins case was filed by the Attorney-General *ex officio* in this court, without leave, as he had

a right to do, was a proceeding by *quo warranto* which this court had a right under the Constitution to issue, **was controlled by the common law practice** in *ex officio* cases of *quo warranto*, was not affected by the statute in relation to amendments, for as was shown in the Stewart case that statute applies only to circuit courts and not to this court, and therefore no admendment was permissible in that case."

And such has been the contention of the Attorney-General throughout every stage of this proceeding, and in his brief filed in opposition to the demurrer, page 12, and in his brief in support of his motion for judgment on the pleadings, page 16, he expressly concedes that **"the sufficiency of the answer of the respondent in this case must be determined according to the rules of pleadings at common law".** It being admitted then by both parties to this proceeding that the pleadings are governed by the rules of the common law system of pleading, it becomes necessary to determine whether or not under the rules of pleading as they existed at common law, the answer filed in this case was sufficient to raise an issue of fact.

An examination of this answer, which is set out on pages 5 to 8 of this brief, will disclose that it is in two counts. The 1st is a general denial of **all** the charges contained in the information. The 2nd count is a further answer, merely to that portion of the information charging non-user, and sets out affirmatively facts tending to show that between the 18th day of January, 1901, and the 16th day of June, 1905, the State was by its conduct estopped from insisting upon a performance by plaintiff in error of its franchise to give agricultural ex-exhibitions. The first ground of the motion for judg-

ment on the pleadings, which is the only ground of the motion considered by the Supreme Court of Missouri, prays final judgment in favor of the State because as it alleges the answer "fails to state facts, showing any sufficient cause or excuse for or any legal defense to the non-user of respondent's franchises authorizing it to give exhibitions of agricultural products," etc. And in support of this motion it is claimed by the State that plaintiff in error has attempted to unite in the same plea the general issue with a plea of confession and avoidance, which it is contended cannot be done at common law, but at common law the general issue is wiped out by the plea of confession and avoidance, which must confess and then avoid, and as the matter of avoidance was insufficient at law, a final judgment was proper. Or, if the above pleas are properly united, the State further claims that the plea of estoppel admits the non-user charged, and does not state facts sufficient in law to justify the same.

Taking up these propositions in their order, we submit that it has always been the rule at the common law that a plea of estoppel or waiver constituted an exception to the rule against duplicity, and a defendant has always been permitted to set up a matter in estoppel, along with the general issue or other defense in bar, and it has never been considered double pleading so to do.

In describing pleas by way of estoppel at common law, Prof. Martin in his work on civil procedure at common law, says, Section 303:

> "It is not a denial or a traverse, **neither does it admit or confess the allegations pleaded to.** It resembles a plea in avoidance of the declaration,

> in that, it alleges new matter, but the new matter is not in form or substance an avoidance of the cause of action. It operates more to preclude the plaintiff from availing himself of the allegations of his declarations by reason of inconsistency therewith under the law of estoppel. It is treated as an **exception** to the rule of pleading that a party must demur or traverse or plead by the way of a confession and avoidance."

And at a very early date, the harsh rule against duplicity was abolished as to all kinds of defenses, in so far as defendant's pleading in chief was concerned, by the Statute of Anne, by which enactment parties were permitted to set up any number of consistent defenses in their plea. So that from any standpoint, the answer on file is in proper form, and is a good plea under the rules of the common law; and it is certainly a good answer under the Missouri Code of Civil Procedure which contemplates but one answer, and requires that all defenses be set out in that answer.

R. S. Mo. 1899, Section 604.

The next question to be determined therefore is, does the new matter in the answer admit the charge of non-use? Because if it does not admit such charge, then such charge was put in issue by the general denial set out in the first count of the answer, and plaintiff in error was entitled to a trial of that fact.

We have tried throughout every stage of this proceeding to induce the Missouri Court or the defendant in error to point out a single word or phrase in this answer, which could possibly be tortured into an admission of anything. We earnestly request that the Court but read this answer, and we submit that it cannot be said that that answer admits anything

charged in the information without doing violence to the English language. The answer is addressed expressly as a further defense to a portion only of the charges made in the information and sets out matters of fact which the pleader claims would, if true, be sufficient to estop the State from complaining of any non-user. It does not admit that there has been any non-use; on the contrary, the answer concludes with the following averment:

> "But respondent further avers that it has in good faith endeavored at all times to exercise the franchises granted to it by its articles of incorporation in the manner and for the purposes intended by such grants, and that such is its purpose in the future, and respondent intends in every way to comply with, and perform according to law, all the obligations which it assumed upon the grant of the aforesaid franchise to it by the State of Missouri, and respondent again specifically denies each and every charge, allegation or assertion of a contrary purpose on its part contained in the information filed herein."

In other words, the necessary legal effect and positive statement of the answer is, *i. e.*, a denial of non-user and all other averments in the information, coupled with a positive defense as to non-user, to-wit, that the informant is precluded from relying on that.

There cannot be any inconsistency between a denial of the non-user, and a plea that the State is estopped to complain of it. The test of whether or not defenses are inconsistent depends upon whether the proof of one will disprove the other. Now, in this case, it may very well be, that the plaintiff in error had every year exercised its franchise to give agricultural exhibitions, and yet at the same time the State might by its conduct

have estopped itself from requiring plaintiff in error to exercise such franchise. Such defenses are perfectly harmonious, and consistent. The proof of one does **not** necessarily disprove the other, but it is perfectly possible that both defenses might be pleaded and proved in the same proceeding. It follows, therefore, that at the time this drastic judgment was entered by the Supreme Court of Missouri ousting the plaintiff in error of every franchise and right which it possessed, and forfeiting its charter, the **record** upon which said judgment was entered consisted of a **charge, a denial** and a plea of **estoppel,** and we submit that whether the new matter pleaded as an estoppel was sufficient or insufficient, the general denial put the entire charge in issue, and that plaintiff in error was entitled to a trial of that charge, and that a judgment entered on a charge and a plea of not guilty, is not due process of law, and does not become due process of law, because the Court rendering it, is pleased to call that an admission which no fair-minded person reading the English language in its ordinary meaning could possibly torture into an admission of anything.

Due process of law is synonymous with the term "law of the land"; and has been defined as follows:—

> "By the law of the land is most clearly intended the general law; a **law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.** The meaning is that every citizen shall hold his life, property and immunity under the protection of the general rules which govern society."

And it has been very recently held by this Honorable Court in a most thorough opinion by Mr. Justice Harlan,

in which all the cases are reviewed, that due process of law may be as effectually denied by the judgment of a State Court as by a legislative enactment. C. B. & Q. v. Chicago, 166 U. S. 226; 41 Lawyers, 979 *l. c.* 983, where it is said:

> "But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that Amendment against deprivation by the State 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State'. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.' *Ex parte* Virginia, 100 U. S. 339, 346, 347 (25: 676, 679); Neal v. Delaware, 103 U. S. 370 (26:567); Yick Wo v. Hopkins, 118 U. S. 356 (30: 220); Gibson v. Mississippi, 162 U. S. 579 (40: 1078). These principles were enforced in the recent case of Scott v. McNeal, 154 U. S. 34 (38: 896), in which it was held that the prohibitions of the 14th Amendment extended to 'all acts of the State, whether through its legislative, its executive, or its judicial authorities', and, consequently, it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th Amendment.
>
> Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to

make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. U. S. v. Cruikshank, 92 U. S. 542, 554 (23: 588, 592); Leeper v. Texas, 139 U. S. 462, 468 (35: 225, 227). **But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment.** In determining what is due process of law regard must be had to **substance,** not to form. This court, referring to the 14th Amendment, has said: 'Can a State make anything due process of law which, by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U. S. 97, 102 (24: 616, 619). The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a State court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that Amendment."

And to the same effect are Yick Wo v. Hopkins, 118 U. S. 356; and Ah Sin v. Wittmann, 198 U. S. 500.

As said by this Honorable Court in the case just quoted, the judicial authorities of a State may keep within the letter of a statute prescribing forms of procedure and give the parties interested the fullest opportunity to be heard and **still** it might be that its **final action** might be inconsistent with the Amendment. This is exactly the case which we are presenting. The Supreme Court of Missouri permitted the defendant to go through the form of filing an answer. It never gave defendant a hearing on that answer. Its final action, finding the plaintiff in error guilty, without a trial of the charge, was as much a denial of due process of law, as if it had never accorded to the plaintiff in error a day in court at all.

Due process of law is that law which proceeds upon inquiry and renders judgment only after trial. None of which fundamental rights were accorded plaintiff in error by the Missouri court; but that Court, while pretending to follow the form of legal proceedings, absolutely denied to the plaintiff in error any right to make defense, or to show that it was not guilty of the charge laid. And we submit that in rendering the final judgment in this case, **without a trial** of the **issues raised by the pleadings**, the Supreme Court of Missouri denied to plaintiff in error rights guaranteed by the 14th Amendment, and that its judgment should be reversed.

II.

The most that a Court can do, for the non-use of a granted franchise, or the usurpation of an ungranted one, is to oust the corporation from further use of the franchise thus neglected or usurped. To forfeit other franchises which have not been neglected or usurped, is confiscation, and amounts to a denial of due process of law.

It is an elementary principle of law that no corporation is required to exercise **all** the franchises granted to it, as a condition to the exercise of any of them, unless such requirement is **expressly** made in some statute or ordinance under which it obtained some of its powers, or unless the powers are inseparably connected with each other.

> Cyc. of Law and Procedure, Vol. 10, p. 1282, subdivision C.

And this proposition has been expressly held to be the law in the federal courts in the case of Illinois Trust & Savings Bank v. Doud, 105 Fed. Rep. 123, where the Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said:

> "Now, conceding that the franchises of a public, or *quasi*-public corporation, may be forfeited for mis-use or renunciation, still the entire failure of this corporation to exercise its power to furnish electric light, would have furnished no ground for the forfeiture of its franchise to furnish steam heat and power, and to operate its street railway. Another of the franchises granted to this corporation under its articles was the power to buy, hold, use and sell the corporate stock of any competing corporations in the City of Ottumwa. None of the franchises to operate a street railway, to furnish

electricity or to furnish steam heat and power could have been forfeited, because the corporation had not exercised its power to purchase the stock of rival corporations. No corporation is required to exercise all the powers granted to it by its organic laws, as a condition of the exercise of some of them, unless that requirement is expressly made by some statute or ordinance, under which it derives some of its powers or privileges or the powers are inseparably connected with each other."

And further on the next page, the same Court in the same case says:

"It is only for the violation of an express provision of the organic law, under which a corporation derives its powers or privileges, or for such misuse or non-use of them as results in a substantial failure to fulfill the design and purpose of its organization that a forfeiture of a franchise will be decreed.

"State *ex rel.* Crossland v. Omaha and C. B. R. and Bridge Co., 91 Iowa 517, 521; 60 N. W. 121;
State *ex rel.* Att'y-Gen. v. Farmers Coll., 32 Ohio St. 487;
State *ex rel.* Pros. Att'y v. Commercial Bk., 10 Ohio 535;
Harris v. Mississippi Valley and S. I. R. Co., 51 Miss. 602;
Chicago City R. Co. v. People *ex rel.* Story, 73 Ill. 541;
State v. Real Estate Bk., 5 Ark. 595;
State *ex rel.* Att'y-Gen. v. Societe Republicaine, 9 Mo. App. 114."

And in State *ex rel.* v. Societe Republicaine, 9 Mo. App. 114, *l. c.* 119, the Court said:

"Where a **non-user** is the ground of a forfeiture it is said that it should be **total** and **clear.**"

And in State *ex rel.* v. Wood, 13 Mo. App. 142, the same Court said:

> "The rule in regard to acts of mis-user and non-user is that it must relate to matters of the **essence** of the contract between the soverign and the corporation, and we see no reason why that rule should not be applied in the present case.
>
> Harris v. Railway, 51 Miss. 602;
> State *ex rel.* v. National School, 76 Mo. App. 444."

And in Attorney-General v. Bank, 1 Hopkins Ch. Rep., N. Y., 354 *l. c.* 360, 361, the Court said:

> "This bank was in operation about three years. It then stopped payment and has neglected to redeem its notes for the last four years. During the whole of that period, it discontinued its business. It has been contended that its corporate franchises have been forfeited by non-user. This idea is not just. The mere omission by a corporation to exercise its powers, does not of itself unconnected with other cases work the forfeiture of this charter. The rule is so laid down in the Eng. books and has been repeatedly announced in our court."

And in its opinion in this case, the Supreme Court of Missouri, concedes (Printed Record, page 40) that courts act with extreme caution in proceedings like this, and forfeiture will not be declared for non-user, unless the non-use is **willful** and relates to franchises which are of the **essence** of the contract with the State.

Having in view the principles of law declared in the above cases, we submit that it is apparent from a mere glance at plaintiff in error's charter that the power to give public exhibitions of agricultural products was purely collateral, and unnecessary to the main purpose for which plaintiff in error was incorporated.

The charter starts out as follows: "The purposes for which this corporation is formed are, to encourage and promote agriculture and improvement of stock, **particularly** running, trotting and pacing horses". There is an express declaration of the purposes for which the company is formed, they are two. (1) To promote agriculture, and (2) To improve stock. And the charter expressly states that the "particular" stock which the company is to improve, are "running, trotting and pacing horses"? And by the use of the word "particular" clearly shows that this is the special purpose for which the company is formed. The charter then goes on to state how these two principal purposes are to be carried out, as follows: "By giving exhibitions of agricultural products, **and exhibitions of contests of speed and races between horses for premiums, purses and other awards and otherwise.**" That is to say that its purpose of promoting agriculture, is to be furthered by it giving agricultural exhibitions, and its purpose of improving stock, is to be furthered by giving exhibitions of "contests of speed and races between horses for premiums, purses, awards and otherwise." The charter then empowers plaintiff in error to "establish and maintain suitable fair grounds and a race track in the City or County of Saint Louis, with necessary buildings, erections and improvements." This power is obviously given to further the principal purpose of improving stock, and authorizes the plaintiff in error to maintain a fair grounds and race track, where it may hold its "contests of speed and races between horses". The charter next empowers plaintiff in error to "give or conduct on said ground and race track, public exhibitions of agricultural products, and stock and of speed or races between horses

for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto, and to said grounds and track." Thus clearly showing that the charter contemplated that the plaintiff in error may hold agricultural exhibitions and may conduct races on its said fair grounds, and race track, and that it may charge the public admission thereto. Clearly showing that its principal purpose and business is to be for profit, and as there is ordinarily no profit connected with the giving of agricultural exhibitions, it clearly shows that that was merely an incidental franchise put into the charter because it was thought that plaintiff in error might desire at some time, to use its grounds for such a purpose. The charter then empowers plaintiff in error "to engage in pool selling, book making and the registration of bets upon exhibitions of speed and races at the said race track and premises as provided for by law, and to let the right to others to do the same." This power has now been taken away by a recent statute passed by the legislature of Missouri, making book making and pool selling a criminal offense; so that it cannot now be considered a part of plaintiff's charter. It is important however as indicative that the principal purpose for which plaintiff in error was incorporated was to operate a race track. The charter then empowers plaintiff in error to "conduct restaurants, cafes, stands, etc., for the sale of refreshments to its patrons" and ends with the general power "to do and perform all acts necessary or incidental to the accomplishment of the main purposes for which the company was incorporated". That the principal purpose for which this company was incorporated was to operate a

race track, and that such was the **essence** of its contract with the State, clearly appears from its very name "Delmar Jockey Club." The law of Missouri requires that every corporation shall include in its title some word indicative of its business. The term "Jockey Club" was selected to meet that requirement, and plainly advertises to everyone that the business of this company is connected with the racing of horses.

In view of the above quoted provisions of the charter of plaintiff in error, it seems to us too clear for argument that this company was unmistakably a race track corporation. That the essence of its contract with the State was the holding of racing meets for contests of speed and skill between running, trotting and pacing horses. This was its only source of profit, and the power to hold agricultural exhibitions was merely inserted in its charter, because it is well known that a race course is a very suitable place for holding agricultural exhibitions and the incorporators thought that they might at some time desire to give some such fair on their premises.

We submit, therefore, that even though it be true, which we deny, that the plaintiff in error has admitted a failure to hold any agricultural exhibition on its premises, that such an admissison merely shows a failure to exercise an incidental, collateral and purely permissive franchise, not required by any statute or law of the State of Missouri and not made a condition of the original grant; but simply one of a number of minor franchises, the exercise of all of which is not contemplated, and the failure to exercise anyone of which is not a violation of the company's contract with the State, and does not pertain in any way to the

principal purpose for which the plaintiff in error was incorporated, and would not warrant a foreiture of plaintiff in error's charter.

But aside from all this, and even though it could be held, though upon what theory we are at loss to understand, that plaintiff in error has admitted a failure to give any agricultural exhibitions, and that such failure amounts to a non-use of its principal franchise, and goes to the essence of its contract with the State, still we submit that the State has no power, for the non-use of a particular franchise, to withdraw other valuable franchises, which have not been neglected or non-used. This was held to be the law by the Supreme Court of N. Car. in Wadsboro Cotton Mills v. Burns, 114 N. Car. 353, *l. c.* 356, where the Court said:

> "The objection that there has been a departure from the original purposes of the corporation, because it has not seen fit to do anything but to spin yarns out of cotton (one of the several objects of the incorporation) is equally untenable. This is a matter addressed to the discretion of the company, and if they do not avail themselves of all of these corporate privileges—that is manufacture all the things they are permitted to manufacture—this surely does not avoid the act of incorporation."

And this rule has even been extended to cases where the corporation has usurped powers which it did not possess, the courts holding that in such cases the State will merely forbid the further exercise of the franchise usurped, but will not take away other franchises, which are being lawfully exercised.

In Am. & Eng. Enc. of Pleading and Practice, Vol. 17, page 482, Sec. 2, the author states the following as the result of all of the cases.

"Ouster of Particular Franchises.

Where the corporation assumes to exercise a particular franchise which it has no power in its charter to exercise, *quo warranto* may be brought and the judgment may be ouster of the particular franchise without avoiding the corporation in regard to its proper franchises."

Dashaway, 84 Cal. 118;
State v. Norwalk, 10 Conn. 167;
State v. Topeka, 31 Kans. 454;
State v. Regents, 55 Kans. 359.

This rule was applied by the Supreme Court of Missouri, in the State of Missouri, *ex. inf.* v. Lincoln Trust Co., 144 Mo. 562, *l. c.*, 569, where the defendant was merely ousted from the exercise of the franchise which it was usurping, but was not disturbed in the exercise of its lawful franchises.

Now the plaintiff in error in this case has many valuable franchises other than that authorizing it to give agricultural exhibitions, and all of which might lawfully be exercised under the laws of this State, except the power to make books and sell pools, which has been taken away by a criminal statute. Some of these powers are to improve stock, particularly running, trotting and pacing horses, by giving exhibitions of contests of speed and races between horses for premiums, purses and other awards, and to charge and receive price of admission from the public. To own and operate a racetrack and to charge the public for admission to their grounds, and contract to conduct restaurants, cafes and stands for the sale of refreshments. All of which franchises are **valuable property** rights of the company and its stockholders. The judgment of the Supreme Court of Missouri does not pretend to hold that any of

of these franchises have been either neglected, misused or abused, and to deprive the plaintiff in error and its stockholders of these **valuable** property rights without any showing whatever that they have misused or neglected them is a plain case of confiscation, and deprivation of property without due process of law. Especially is this true in view of the fact that there is no showing that the incidental franchise claimed to have been neglected was **willfully** so neglected, and it is conceded in the opinion of the Supreme Court of Missouri that it has no power to render judgment of ouster unless the judgment of nonuser was willful. No evidence has been taken in this case. The only matter in the record bearing on the plaintiff in error's good faith is contained in its answer, where it not only **expressly** disclaims in the concluding paragraph any intention or desire to violate the laws of Missouri or to misuse or neglect any of its franchises, but it sets up matter in its answer, which whether it be sufficient in law to justify the nonuser or not, at least shows that plaintiff in error in good faith supposed it was complying with the franchise giving the right to give agricultural exhibitions, by contributing thousands of dollars every year to the holding of a State fair at Sedalia, Missouri. And that it was exercising its charter power according to the terms of its charter. And while this may or may not have been a technical compliance with the charter, it certainly shows that plaintiff in error was acting with the utmost good faith.

We submit that the judgment of the Supreme Court of Missouri forfeiting plaintiff in error's charter, because of an arbitrary inference of non-user of its permissive

grant, in the face of a general denial denying said non-user, and without a trial of the issues, or without any showing that said non-user was willful, is not due process of law within the meaning of the 14th Amendment, and that such an unwarranted judgment should be reversed.

Henry S. Bond

Thomas Bond

Attorneys for Plaintiff in Error.

Supreme Court, U. S.
FILED.
APR 27 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

DELMAR JOCKEY CLUB (a Corporation),
Plaintiff in Error,
vs.
STATE OF MISSOURI, on Relation of THE ATTORNEY GENERAL,
Defendant in Error.
No. 219.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PLAINTIFF IN ERROR'S BRIEF IN REPLY.

HENRY W. BOND,
THOMAS BOND,
Attorneys for Plaintiff in Error.

St. Louis Law Printing Co., 311-315 Locust. Bell, Main 1819; Kinloch, Central 986 L

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

DELMAR JOCKEY CLUB (a Corporation),
Plaintiff in Error,
vs.
STATE OF MISSOURI, on Relation of THE ATTORNEY GENERAL,
Defendant in Error.
No. 219.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PLAINTIFF IN ERROR'S BRIEF IN REPLY.

I.

The Federal rights and immunities claimed were duly set up in the State court.

It is stated in the brief for the defendant in error that Federal questions were set up by plaintiff in error only in the first and third grounds of its motion for a rehearing. This is incorrect. Plaintiff in error not only invoked the protection of constitutional guarantees against a judgment ousting it of its franchises for an

alleged non-user without a trial of that issue, in the first and third grounds of its first motion for a rehearing in the State court, but also in the fifth ground of said motion. (Record, page 32.)

In the **third** ground of the first motion for a rehearing plaintiff in error invoked the guarantees of the Fourteenth Amendment because the judgment entered against it for non-user was entered without a trial of the charge. And in the **fifth** ground of said motion plaintiff in error invoked the Fourteenth Amendment because the Court ousted it of **all** of its franchises for an alleged non-use of one. In both of these respects the judgment entered was a denial of due process of law.

And these are the two points which are now relied on in this court for a reversal, to-wit: That in view of the guarantees of the Fourteenth Amendment, no judgment of ouster could have been entered for non-user without a trial of that charge, and second, that even if it were possible to enter such a judgment, plaintiff in error could not have been ousted of all of its franchises for the non-use of one, without confiscating its property.

That these constitutional guarantees were properly raised has been fully discussed in our brief heretofore filed in this court in opposition to the defendant in error's motion to dismiss, wherein it was pointed out that where a federal question appears anywhere in record, and the federal right claimed was necessarily denied by the decision of the State Court, it is not necessary that the particular section violated be pointed out, or that it be set up by any particular form of words, but it is sufficient if the **attention** of the State court be called to the right, title or immunity denied.

Green Bay Miss. Canal Co. v. Patten Paper Co., 172 U. S. 58, *l. c.* 68; 43 L. Ed. 364;
Dewey v. DesMoines, 173 U. S. 193, *l. c.* 199; 43 L. Ed. 364;
San Jose Land & Water Co. v. San Jose Range Co., 189 U. S. 175, *l. c.* 180;
Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716;
Harris v. Dennie, 3 Pet. 292, 7 L. Ed. 683;
Eureka L. & Y. Canal Co. v. Yuba Co., Supt. Ct. 116 U. S. 410, 29 L. Ed. 671.

And federal questions raised in a motion for a rehearing are not raised too late if the Court **sustains** said motion, as was done in this case.

Mallet v. N. Carolina, 181 U. S. 589, *l. c.* 592, 45 L. Ed. 1015, *l. c.* 1018;
Mutual Life Insurance Co. v. McGrew, 188 U. S. 291, *l. c.* 308–309, 47 L. Ed. 480, *l. c.* 485.
(See brief on file for plaintiff in error in opposition to defendant in error's motion to dismiss, in which jurisdictional questions are fully discussed.)

But, aside from the foregoing, plaintiff in error in this case invoked the constitutional protection now relied upon, in the only manner the nature of this case permitted. This was not the ordinary law suit originating in a trial court where constitutional guarantees could be set up by motion for a new trial. But was an original proceeding in the Supreme Court, where it did not become necessary to invoke constitutional guarantees until the entry of the first judgment sustaining the attorney general's motion for judgment on the pleadings, because until that judgment had been entered ousting plaintiff in error of valuable franchises without trial, no federal right had been denied, nor had any such denial been

threatened until the attorney general filed his motion for judgment on the pleadings. As such motion was a final pleading, plaintiff in error had no right to plead further to it, and hence prior to the entry of the first judgment by the Missouri Supreme Court, plaintiff in error had no opportunity to set up in the record, the federal rights which the judgment denied. Promptly upon the entry of the ~~first~~ judgment sustaining the attorney general's motion, in the face of a direct traverse and without a trial, constitutional guarantees were at once set up in the only way that they could be set up, that is, by a motion for a rehearing filed June 6th, 1906. That motion was **sustained**, and the judgment set aside, though in sustaining the motion the Missouri Court refused to permit further argument, and refused to permit plaintiff in error to amend its answer, although it expressly requested leave so to do in point four of the aforesaid motion for a rehearing. (Record, page 32.) The case was taken as resubmitted, no further argument was allowed and with its attention thus called to the constitutional guarantees duly set up and claimed, the Supreme Court of Missouri again entered judgment denying the same, and we submit that under the circumstances, it was impossible for plaintiff in error to have set up the federal rights and immunities relied upon in any more regular or timely manner than was done in this case.

II.

Judged by the rules of the common law the answer is not duplicitious, and raised an issue of fact.

As pointed out in our original brief, the answer filed by plaintiff in error consisted first of a general denial

of the entire charge, and second a plea in the nature of an estoppel, that the State was by its conduct precluded from complaining of any non-user by plaintiff in error of its franchise to give agricultural exhibitions.

It is conceded that in this proceeding the pleadings are governed by the rules of the common law, and we submit that judged by those rules the answer was a good plea, and that whether the matter set up in the second count was sufficient or insufficient to amount to an estoppel, plaintiff in error was entitled to a trial on the issues raised by the first count of its answer, which denied generally **all** the charges set up in the information.

The early rule of the common law that a defendant was not allowed to plead separate defenses to the same claim or cause of action, never forbade the union of a general denial and a plea of estoppel. For a plea of estoppel was **always** treated as an exception to that rule.

Martin on Civil Procedure, Section 303.

In Cyc. of Pleading & Practice, Vol. 8, page 10, the compiler says:

> "A plea of estoppel may be joined with a general denial when the averments, by way of estoppel, are not inconsistent with such denial."

And in Blodgett v. McMurtry, 39 Net. 210, the Court says:

> "We have been unable to find any case holding that a plea of estoppel *in pais* cannot be joined when one amounting to a traverse, where the two are not in their nature inconsistent."

See also Davis v. Bryant, 6 Ill. 104.

And in Andrews' Stephen on pleading, after discussing in detail the rule cited by defendant in error herein

to the effect that but one defense could be set up to one claim, the author proceeds on page 279 and 280 to discuss the **exceptions** thereto, among which he enumerates pleas in **estoppel** as follows (page 280) to-wit:

> "There is another exception in the case of pleadings in **estoppel.**"

Defendant in error does not take issue with this proposition, that a plea of estoppel may be joined in the same answer with a general denial and that the defendant is entitled to rely upon both defenses, but seeks to get around the same by claiming that the answer in this case is a confession and avoidance. Such a contention, however, is refuted by the merest glance at the answer on file, which has not a single element of a common law confession and avoidance. It does not pretend to give any color to relator's claim, nor to confess the same, nor to admit that any cause of action ever existed, nor to set up any matter which would avoid what would otherwise be a good claim. The only matter which it purports to set up is matter of estoppel, that is to say, that in view of the State's conduct in receiving money from plaintiff in error and appropriating it to the purpose of holding a State Fair, it is not in a position to raise any issue with plaintiff in error as to giving any further Fairs. In other words, the matter pleaded is merely matter in estoppel and not matter in avoidance, and being matter in estoppel it was properly joined in the same answer with the general denial, and whether the matter pleaded as an estoppel be sufficient or insufficient, it does not admit anything, and plaintiff in error was entitled to a trial on the issues raised by its traverse.

III.

An erroneous construction of pleadings or mere error in the State court does not raise a Federal question, but an entry of judgment without trial in the face of a traverse, IS a denial of due process of law, and violates the Fourteenth Amendment.

We do not dispute the elementary proposition set up in the brief for the defendant in error, to the effect that this Court will not review mere matter of error on the part of a State court, in the disposition of causes coming regularly before it, nor will it interfere with the rulings of the State court in regard to mere matters of pleadings and practice. But what we do claim is that where a defendant has come in and by a regularly formulated plea put in issue the charges made against him, no State court can enter a judgment sustaining said charges without a trial, and that the jurisdiction of this Court to review such an unwarranted proceeding is not defeated because the State court is pleased to call such an answer an admission of the charge which plainly cannot be construed into an admission of anything. If such were the law a citizen might be indicted, might come into court and plead not guilty to the indictment. And then without trial or hearing, the State court might enter judgment sentencing him to prison; and by handing down an opinion stating that the plea of **not guilty** was an **admission** of the charge, oust this court of jurisdiction to review its judgment on the ground that it was a mere erro-

neous ruling on a pleading, and that defendant had had a day in court. Such a proceeding would of course not be tolerated and this Court would have no hesitancy in setting aside the judgment as being a denial of due process of law. Yet, that is exactly the case which is presented on this record. We have an information filed in the State court setting up serious charges against the plaintiff in error. We have an answer of plaintiff in error on file denying generally all of those charges, and setting up further matter showing that the State has no right to complain of certain of them. We then have a judgment finding plaintiff in error guilty of certain of the charges set up in the information, though all of such charges are denied, and there has been no trial of the truth or falsity of the charges made. Such a record does not present a question of mere error in the State court, but presents a case where a day in court has been denied the defendant, where judgment has been entered without trial, and where, if such judgment is permitted to remain in force, property will be taken without due process of law.

Defendant in error cites the case of Michigan v. Railroad Company, 152 U. S. 368. That was a case in which the State brought suit in ejectment to recover certain lands. The defense was that the State was estopped by its acts, conduct, silence and acquiescence. Proofs were taken, a trial had, and after hearing the evidence the Court rendered its judgment, holding said defense to be well taken, and that the State was estopped to bring the suit, and its bill was dismissed. On writ of error this Court held that as no federal question was presented, it could not review the correctness or incor-

rectness of the ruling of the State court as to whether or not an estoppel had been proven. This case is in perfect harmony with everything that we claim in this proceeding. We are not complaining of the ruling of the Supreme Court of Missouri as to the sufficiency or insufficiency of the matter pleaded in our answer as an estoppel, we do not care if the judgment of the Supreme Court in that respect be correct or incorrect, and if incorrect, we do not claim that in that respect this Court has any power to review it. But what we do claim is, that even though that plea of estoppel be insufficient in law to amount to an estoppel, still there was a general denial on the record putting in issue all the charges made in the information, and that **no court** could enter a judgment in the face of that plea without a trial of the matters put in issue by that plea.

In the case at bar, had the Supreme Court of Missouri sustained a demurrer to the plea of estoppel (which was the proper way to attack such defense), still it had no further constitutional right to enter a judgment depriving defendant of its property in the teeth of a general denial duly entered of record by defendant, of every charge contained in the information filed by the attorney general.

There can be no clearer case of judicial usurpation than the denial of a right to be heard and to adduce proofs in support of controverted issues. Yet, the Supreme Court of Missouri, in the case at bar, presumably holding the defense of estoppel insufficient, went further and without a semblance of proof or pretense of hearing, adjudged defendant guilty of the charges brought against it, every one of which charges was expressly denied by the answer filed by the defendant.

Because of this arbitrary and unjudicial procedure, we respectfully ask that the judgment of the Supreme Court of Missouri be set aside, and the cause remanded for the taking of proofs on the issues joined.

Respectfully submitted,

Henry T. Bond

Thomas Bond

Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907

DELMAR JOCKEY CLUB (a Corporation),
Plaintiff in Error,
vs.
THE STATE OF MISSOURI, ON THE RELATION OF THE ATTORNEY GENERAL,
Defendant in Error.
No. 219.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

In reviewing the judgment of a State court, this court will determine for itself the different questions involved in the determination of the question whether the judgment of the State court deprived the plaintiff in error of its property without due process of law as guaranteed by the Fourteenth Amendment.

Huntington v. Attrill, 146 U. S. 657–664;
Mobile & Ohio Railroad Co. v. Tennessee, 153 U. S. 486–492, 495;
Scott v. McNeal, 154 U. S. 34.

We believe that all of the questions discussed in the defendant in error's reply brief have been fully covered in the briefs previously filed by the plaintiff in error in this case. In view of the fact, however, that it is contended that the decision of the State court is not a denial of a constitutional right, we desire to call this Honorable Court's attention to a line of authorities which were discussed in the argument, but are not cited in the other briefs. The principle involved in these cases is that where it is claimed that a federal or constitutional right has been denied, that for the purpose of determining whether or not the plaintiff in error has been denied such right, this Court will review the decision of the State court as to all questions necessarily involved in the determination of whether or not such right has been denied. For instance: In this case we claim we have been denied the right to a trial, and for the purpose of determining whether or not we have been denied a trial, this Court must decide whether or not there were any issues to try, and if it finds that the parties were at issue, and that the plaintiff in error was accorded no opportunity to summon witnesses and was given no hearing on its defense, then the prohibitions of the Fourteenth Amendment have been violated.

In Huntington v. Attrill, 146 U. S. 657, a writ of error was sued out to review a judgment of the highest court of Maryland, refusing to enforce a judgment of the State court of New York on the ground that the cause of action out of which the New York judgment resulted was brought to enforce a statutory penalty against a director of a corporation, and that

such statute was a penal statute and had no extra territorial force. This Court held that in order to determine whether or not full faith and credit had been denied the New York judgment, it must first determine whether or not the statute under which the New York judgment was obtained was penal or remedial. Obviously, a mere matter of general and not federal law. In so holding this Court said (*l. c.* 664, L. Ed., *l. c.* 1133):

> "If a suit to enforce a judgment entered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this Court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, **must determine for itself whether the original cause of action is penal in the international sense.** The case in this regard is analogous to one rising under the clause of the Constitution, which prohibits a State to pass any law impairing the obligation of contracts, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this Court has no jurisdiction to review its decision; but if the State Court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this Court has power, in order to determine whether any contract has been impaired, **to decide for itself what the true construction of the contract is.** New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 38 (31, 607, 614). So if the State court, in an action to enforce the original liability under the law of another State, passes upon the nature of that liability and nothing else, this Court cannot review its decision, but if the State court declines to give full faith and credit to a judgment of another State because of its opinion as to the nature of the cause of action on which the judgment was re-

> covered, **this Court in determining whether full faith and credit have been given to that judgment must decide for itself the nature of the original liability.**"

And in Mobile & Ohio Railroad Co. v. Tennessee, 153 U. S. 486, a writ of error was sued out to review a judgment of the highest court of Tennessee, which it was alleged gave validity to a State statute which impaired the obligation of a contract. The State contended that this Court was without jurisdiction, because the decision of the Tennessee court proceeded on the theory that there was no contract in existence between the railroad and the State to be impaired, and that the decision of the Tennessee court as to such a matter of mere general law was not subject to review. In holding that it had jurisdiction this Court said (L. Ed. 796):

> "The question of the existence or non-existence of a contract in cases like the present one, is one which this Court will determine for itself. The established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provision of the State law which is claimed by the unsuccessful party to impair the contract set out and relied upon, this Court has jurisdiction to determine whether such a contract exists as claimed and whether the State law complained of impairs its obligation."

And in Scott v. McNeal, 154 U. S. 34, it was held that this Court had jurisdiction to review the ruling of a State Probate Court as to whether or not one whose estate the Probate Court had undertaken to administer, was in fact dead at the time—a determination of such question of fact being necessarily involved in the deter-

mination of whether or not his property had been taken without due process of law in violation of the Fourteenth Amendment.

It has thus been held by this Court in the above cited cases, that where it is claimed that the State court has denied rights under the full faith and credit clause, and under the contract clause, and under the due process of law clause, of the Constitution, that for the purpose of determining whether or not such rights have been denied this Court will draw to itself the decision of all questions involved in that determination, and where the decision of the State court on a question of general law involves the denial of a constitutional right, this Court will, for the purpose of determining whether or not such constitutional right has been denied, review the ruling of the State court on the question of general law.

And so in this case, the Fourteenth Amendment guarantees to every person the right to a trial and a hearing. The plaintiff in error has filed an answer in this case denying all of the charges set out in the information. A judgment has been entered in the face of that answer and without any trial of the facts put in issue thereby. Such a proceeding cannot be sustained merely because the State court sees fit to hold that our answer is an admission of the charges made, when such a ruling cannot be sustained on any principle of law. A defendant who comes into court and by regularly formulated pleas puts in issue the charges made against it, cannot be denied a trial if the pleadings in fact raise an issue, and for the purpose of determining whether or not a trial has been denied, this Court must necessarily determine for itself whether or not the pleadings raised issues to be tried. And in determining this

question we think it has been fully shown in the previous briefs filed in this case that under any principle of law the answer in this case put in issue the question of non-user, and yet the Missouri court has denied us an opportunity to sustain by proof the issues which we have raised. Such an unwarranted proceeding as this cannot be sustained under the Fourteenth Amendment, and we submit that the judgment should be reversed, and the cause remanded for trial.

Respectfully submitted,

HENRY W. BOND,
THOMAS BOND,
Attorneys for Plaintiff in Error.

APR 20 1908
JAMES H. McKENNEY,
CLERK.

No. 219.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

DELMAR JOCKEY CLUB (A Corporation), Plaintiff in Error,

vs.

STATE OF MISSOURI, on the Relation of the Attorney-General, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

HERBERT S. HADLEY, Att'y-General,
JOHN KENNISH, Asst. Att'y-General,
For Defendant in Error.

THE HUGH STEPHENS PRINTING CO., JEFFERSON CITY

No. 219.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

DELMAR JOCKEY CLUB (A Corporation), Plaintiff in Error,

vs.

STATE OF MISSOURI, on the Relation of the Attorney-General, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

At the April term, 1905, of the Supreme Court of the State of Missouri, the Attorney-General of said State filed in the said court, ex-officio, against plaintiff in error, an information in the nature of a *quo warranto*. It is al-

leged in the information that the plaintiff in error was organized as a corporation under the laws of the State of Missouri on the 18th day of January, 1901, with a capital stock of $100,000.00, for the following purposes, as set forth in its articles of association, to wit:

> "The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses and other awards and otherwise; to establish and maintain suitable fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track public exhibitions of agricultural products and stock, and of speed, or races, between horses, for premiums, purses or other awards made up from fees or otherwise, and to charge the public for admission thereto, and to said grounds and track; to engage in pool-selling, bookmaking and registering bets on exhibitions of speed or races at the said race track and premises, as provided by law, and to let the right to others to do the same; to conduct restaurants, cafes and other stands, for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

The information charged the plaintiff in error with wilful misuser and nonuser of its corporated franchises,

and prayed that the said corporation be ousted of its franchises and corporate privileges, that the same be declared forfeited, and that all of its property be declared forfeited to the State.

The franchises conferred upon plaintiff in error, of which nonuser is charged, are set forth in the following paragraph of the information, to wit:

> "Your informant further states that said respondent has never given any exhibition of agricultural products for the purpose of encouraging and promoting agriculture, or for any other purpose; that it has never given any exhibition of contests of speed and races between horses for the purpose of improving the stock of trotting and pacing horses; that it has never established or maintained any fair grounds in the city or county of St. Louis, or any other place." (Printed Record, p. 5.)

A demurrer to the information containing nine separate grounds, was filed by plaintiff in error. The court overruled the demurrer, except as to the first ground, which was sustained. As the judgment now complained of was rendered against plaintiff in error on the ground of nonuser alone, and as the first ground of the demurrer challenged the sufficiency of the information as to some of the charges of misuser, and not as to charges of nonuser of franchises, the action of the court upon said demurrer is not deemed material to the issues now presented.

The defendant in error filed a motion praying the court to modify the judgment on the demurrer, which motion was overruled, and the plaintiff in error, within the time allowed by the order of the court, filed answer to the information. This answer (Printed Record, p.

24), contains two defenses: (1) a general denial, and (2) as to the charge of nonuser of franchises, a defense which the court held to be in the nature of a confession and avoidance. The second defense was based upon the theory that as certain license fees were paid into the State treasury by plaintiff in error for the privilege of selling pools, bookmaking and registering bets on horse races, at plaintiff in error's race track in St. Louis county, and that as such fees so paid into the treasury were thereafter appropriated by the State for the use of the State Fair, held annually at Sedalia, Missouri, a fair established years before plaintiff in error was incorporated (Revised Statutes of Missouri, 1899, Article I of Chapter 104), the State "intended to and did accept the same as full and complete performance and use by respondent of its franchises to give exhibitions of agricultural products and stock, and the said State of Missouri thereby intended to and did waive any other and further exercise of such franchises on the part of respondent." (Printed Record, p. 25.)

Upon the filing of said answer, defendant in error filed a motion for judgment on the pleadings (Printed Record, p. 26), the first ground of which was as follows:

> "First. That said return and answer fails to state facts showing any sufficient cause or excuse for, or any legal defense to, the nonuser of respondent's franchises authorizing it to give exhibitions of agricultural products and exhibition of contests of speed or races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and for the establishing and maintaining of suitable fair grounds in the city and county of St. Louis, as set forth and charged in the information herein."

The second ground of the motion for judgment on the pleadings was with reference to the charges of misuser contained in the information. A motion to strike from the files the motion for judgment on the pleadings was filed by plaintiff in error and overruled by the court. (Printed Record, p. 27, 28 and 29). The cause was then heard by the court upon the issues thus made (no Federal question having been presented) and the court rendered a judgment of ouster against plaintiff in error, upon the charges contained in the information, of both misuser and nonuser, and in addition thereto imposed a fine of $5,000.00. (Printed Record, p. 30).

Thereupon plaintiff in error filed a motion for rehearing, containing six separate grounds. (Printed Record, p. 31). The first and third grounds only, of said motion for rehearing, in so far as a Federal question is sought to be raised, referred to the nonuser of franchises as charged in the information, and in part made the basis of the judgment of the court, and were as follows:

> "First. The court has inadvertently misconceived the scope and state of the pleadings: In this, that the petition charges a misuse and a non-use of the privileges conferred on respondent by its charter. The answer denies generally the allegations as to misuse as well as the allegations as to non-use, and then affirmatively by way of a further defense pleads that the plaintiff is estopped to ask a forfeiture of respondent's franchises, because of mere non-use. * * * * * * *
>
> On the issues joined no judgment or ouster for mere non-use could go further than to oust respondent of its franchise to hold fairs, and a fine of five thousand dollars for mere non-use of

> a privilege conferred by a charter amounts to a cruel and unusual punishment within the meaning of Article VIII of the amendment of the Constitution of the United States, which guarantee respondent here invokes."
>
> "Third. Respondent is charged with nonuse of its corporate franchises as to the right to hold fairs. The general denial of respondent applies to this charge, and there has been no trial as to that fact. Yet the judgment adjudges the respondent guilty without a hearing, thereby also violating the fourteenth amendment to the Constitution of the United States."

It will be noted that a rehearing was thus asked, in so far as the judgment of the court was based upon nonuser of franchises, and referred to a Federal question, (1) upon the ground that the judgment of ouster and the imposition of a fine of five thousand dollars was cruel and unusual punishment, in violation "of Article VIII of the amendment of the Constitution of the United States," and (2) because "the judgment adjudges the respondent guilty without a hearing, thereby also violating the fourteenth amendment to the Constitution of the United States." It will also be noted that said motion for rehearing contained other grounds, not in any sense involving a Federal question.

The motion for rehearing was sustained by the court without opinion and the judgment of ouster, theretofore rendered, set aside. (Printed Record, p. 33). The cause was then re-submitted, not upon the questions raised by the motion for re-hearing, as stated in the brief of plaintiff in error, but as stated in the opinion of court (Printed Record, p. 37), upon the motion for judgment on the pleadings. Thereupon the court rendered a judgment of

ouster, without fine, against plaintiff in error. (Printed Record, p. 34). Neither in the opinion of the court, upon the demurrer, or upon the final judgment of ouster was a Federal question presented or passed upon. Plaintiff in error then filed a second motion for rehearing, containing five grounds. (Printed Record, p. 44). In this motion no Federal question is pretended to be raised, unless in the fifth ground thereof, which is as follows:

"Under the court's decision, respondent would be deprived of its property without a trial of the issues, and without due process of law."

Section 30 of Article II of the Constitution of the State of Missouri is as follows:

"That no person shall be deprived of life, liberty or property without due process of law."

The court overruled plaintiff in error's second motion for rehearing, and the cause was then regularly removed to this court upon a writ of error.

At the October term, 1906, defendant in error filed in this court a motion to dismiss or affirm for want of a Federal question, which motion was by the court continued until the hearing of the cause upon the merits.

POINTS AND AUTHORITIES.

I.

"Question relating to matters of pleading and practice under the laws of the State involve no Federal question."

Taylor on Juris. & Proc. of the U. S. Supreme Court.

Vista County vs. Iowa Falls & S. C. R. Co., 112 U. S. 177.

Iowa C. R. Co. vs. Iowa, 160 U. S. 394.

Nat. F'dry, Etc., vs. Oconto Water Supply Co., 183 U. S. 216.

II.

"The Supreme Court cannot review the decision of the State court resting upon the defense of estoppel."

Taylor, *supra*, 404.

Michigan vs. Flint & Pere Marquette R'd Co., 152 U. S. 363.

Sherman vs. Grinell, 144 U. S. 198.

Israel vs. Arthur, 152 U. S. 355.

Weyerhaueser vs. Minn. 176 U. S. 550.

III.

In the first motion for a rehearing but two of the grounds thereof sought to raise a Federal question as to

the charge of nonuser of franchises. In the first ground it was claimed that the judgment of the court was cruel and unusual punishment and violative of the eighth amendment to the Constitution of the United States; and in the third ground of said motion it was claimed that the "judgment adjudges the respondent guilty without a hearing, thereby also violating the fourteenth amendment to the Constitution of the United States."

1. "The first ten amendments to the Federal Constitution contained no restrictions of the powers of the State, but were intended to operate solely on the Federal Government."

Brown vs. New Jersey, 175 U. S. 172.
Barron vs. Baltimore, 7 Pet. 243.
Fox vs. Ohio, 5 How. 410.
Twitchell vs. Commonwealth, 7 Wall. 321.
United States vs. Cruikshank, 82 U. S. 542, 552.
Spies vs. Illinois, 123 U. S. 131.
Davis vs. Texas, 139 U. S. 651.

2. "Parties having been fully heard in the regular course of judicial proceedings, an erroneous decision of the State court does not deprive the unsuccessful party of his property without due process of law."

Taylor, *supra*, 412.
Central Land Co. vs. Laidley, 150 U. S. 112.
Walker vs. Sauvinet, 92 U. S. 90.
Head vs. Amoskeag Co., 113 U. S. 9.
Morley vs. Lake Shore R. R., 146 U. S. 162.
Bergman vs. Becker, 157 U. S. 655.

IV.

When a constitutional right is asserted in a State court without stating whether such right is claimed under the State or Federal Constitution, and which could have been claimed under either, the presumption is that the right was asserted under the State Constitution.

Porter vs. Foeley, 24 How. 420.

Jacobi vs. Alabama, 187 U. S. 133.

Miller vs. Cornwall R. R. Co., 168 U. S. 131.

Kansas Endorsement Association vs. Kansas, 120 U. S. 103.

Kipley vs. Illinois, 170 U. S. 182.

New York Central R. R. Co. vs. New York, 186 U. S. 269.

V.

"A Federal question is raised too late when suggested for the first time in the petition for rehearing after judgment in the highest court of the State where such petition is denied without opinion."

Taylor, *supra*, 448.

Bushnell vs. Crooke Mining & Smelting Co., 148 U. S. 273.

Turner vs. Richardson, 180 U. S. 87.

Scudder vs. Coler, 175 U. S. 33.

VI.

Under the rules of pleading in the State of Missouri, "A general denial is overcome by a subsequent confes-

sion and attempted avoidance," and "a party cannot traverse and at the same time confess and avoid the same allegation."

See authorities cited in opinion of Supreme Court of Missouri herein. (Printed Record, p. 38).

Under the common law rule a defendant was not allowed to plead separate defenses to the same claim or cause of action.

Martin on Civil Proc. at Common Law, Sec. 317.

The statute of Anne, invoked by plaintiff in error, as modifying the foregoing rule of the common law, was enacted in the year A. D. 1705, (Statutes at Large, 10 Will. 3 to 12 Anne, Chap. 16, Secs. IV & V., p. 206), and therefore is not a part of the laws of Missouri.

Sec. 4151 R. S. Mo., 1899.

VII.

Nonuser of the principal grant in a franchise given to a corporation will authorize the forfeiture of the charter of such corporation.

High's Extra. Legal Rem., Sec. 745.

State vs. Minn. Cen. Ry. Co., 36 Minn. l. c. 259.

State vs. St. Paul & Sioux City R. Co., 35 Minn. 222.

State vs. Comm. Bank of Manchester, 53 Am. Dec. l. c., 109-110.

2 Spelling on Inj. and other Extra. Rem., Sec. 1812.

5 Thomp. Corp., Sec. 6618.

10 Cyc., page 1281, Sec. 3.

Angell & Ames on Corps., Sec. 774.

Terrett et al. vs. Taylor et al., 9 Cranch, l. c. 51.

State ex inf. vs. Equitable L. & I. Co., 142 Mo. l. c. 340-1.

See also opinion of Supreme Court of Missouri herein, and cases cited. (Printed Record, p. 39).

VIII.

The franchises of plaintiff in error, of which non-user was charged in the information, were the principal franchises of the corporation. (Printed Record, p. 3.)

Opinion of Supreme Court, *supra* (Printed Record, p. 40).

IX.

By the forfeiture of the principal franchises "all franchises incident and subordinate thereto, and held by the same grant, were also forfeited."

High's Extra. Legal Rem., Sec. 745.

State vs. Minn. Cen. Ry. Co., 36 Minn. l. c 259.

State vs. St. Paul & Sioux City R. Co., 35 Minn. 222.

State vs. Com. Bank of Manchester, 53 Am. Dec. l. c. 109-110.

ARGUMENT.

It is contended by plaintiff in error that the Supreme Court of Missouri erred in holding that the second defense of its answer amounted to a confession and avoidance, and it is urged that such defense was intended as pleading and estoppel against the State to proceed against plaintiff in error on the ground of nonuser of franchises as charged in the information, and was not inconsistent with the general denial. The answer itself pleads that by reason of the facts therein set forth in the second defense, the State waived the performance and use of said franchises. But whether the facts alleged in said defense furnish a valid excuse for the admitted failure to exercise such franchises, or whether such defense was intended as an estoppel, or a waiver on the part of the State, is of no importance on this hearing. Such questions are matters of pleading and practice, to be determined by the State court under the State laws, and do not involve a Federal question. In the case of Iowa Central Railway Company vs. Iowa, 160 U. S., at page 393, this court said:

> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of a state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties

> to a controversy pending before it that the averments of an answer set forth no defense to the claim of the plaintiff."

And in the case of Michigan vs. Flint & Pere Marquette R'd Co., 152 U. S., at page 368, this court said:

> "The Supreme Court of Michigan held that the State might be estopped by its acts, conduct, silence, and acquiescence; that the only question necessary to be considered and determined was the question of estoppel; and, after a full consideration of the facts applicable to this branch of the case, reached the conclusion that the claim of the State had no foundation in equity, justice or good conscience; that it had become stale; and that the State was estopped to assert title in itself to the lands in question. As its judgment thus rested upon the decision of a question which was not Federal, this court has no jurisdiction to review it, and the writ of error must be dismissed. Adams County s. Burlington & Missouri Railroad, 112 U. S. 123; Israel vs. Arthur, ante, 355."

To such an extent has this court gone in refusing to consider matters of pleading and practice in the State court as involving questions of Federal jurisdiction, that even the sufficiency of an indictment in a State court will not be considered as presenting a Federal question. Re Robertson, 156 U. S. 185, Caldwell vs. Texas, 137 U. S. 698, Brooks vs. Missouri, 124 U. S. 394.

In the first motion for a rehearing, certain Federal questions were attempted to be raised, and, notwithstanding the fact that the motion also contained non-federal grounds and was sustained by the court within opinion,

and a rehearing granted, it is now contended by plaintiff in error that such motion can be resorted to for the purpose of sustaining Federal jurisdiction. When the motion for rehearing was sustained by the court it had then served its purpose. Plaintiff in error had been granted what it had asked for, and such motion has no more to do with the subsequent proceedings and issues in this cause than the demurrer to the information, the motion to modify the judgment on demurrer, or the motion to strike from the files the motion for judgment on pleadings. When the motion for a rehearing was sustained, the judgment rendered against plaintiff in error was set aside, and as stated in the opinion of the court, at page 37 of the printed record, the cause was taken as again submitted on the motion for judgment on the pleadings.

But assuming, for the sake of argument, that the contention of plaintiff in error is correct, the said first motion for rehearing fails to present a question of Federal jurisdiction. The judgment, of which plaintiff in error complains, was based solely upon the ground of nonuser of franchises, as charged in the information, and therefore, only such Federal questions in the motion as bear upon the grounds of nonuser are material upon this hearing. The first and third grounds alone, of said motion, attempt to raise such question. In the first it was claimed that the judgment of ouster rendered and the fine imposed, was cruel and unusual punishment and violative of the eighth amendment to the Constitution of the United States; and in the third ground of said motion it was claimed that the judgment was violative of the fourteenth amendment to the Federal Constitution. It is well settled law, as shown by the authorities cited under Point III of this brief, that the said eighth amendment is not a restriction on the powers of the State, but was intended to operate solely on the Federal Govern-

ment; and also that "parties having been fully heard in the regular course of judicial procedure, an erroneous decision of the State court does not deprive the unsuccessful party of his property without due process of law."

If a Federal question exists in the record in this cause, it must be found in the second motion for rehearing, filed after the final judgment of ouster was rendered against plaintiff in error. In said second motion, the only ground in which a Federal or constitutional question is pretended to be raised, is the fifth, which reads as follows:

> "Under the court's decision, respondent would be deprived of its property without a trial of the issues and without due process of law."

Section 30 of Article II of the Constitution of the State of Missouri, provides: "That no person shall be deprived of life, liberty or property without due process of law." It is apparent that the fifth ground of the second motion for rehearing invoked a principle of constitutional law found alike in both the State and Federal Constitutions, and in such case the law is thoroughly settled that the right will be considered as having been asserted under the State and not under the Federal Constitution.

With this brief review of the pleadings and issues in the lower court, it is confidently contended by the defendant in error that the record in this case fails to show Federal jurisdiction, and that the writ of error should be dismissed, or the judgment affirmed.

Under the rules of pleading in the State of Missouri, a general denial is overcome by a subsequent confession and attempted avoidance, or by an affirmative defense inconsistent with the general denial. This question is

fully discussed in the opinion of the Supreme Court of Missouri, as found in the printed record at page 38. But it is argued by plaintiff in error that under the rules of the common law, which govern the practice in original proceedings in the Supreme Court of Missouri, the second defense of the answer and the general denial could consistently stand together. In support of this contention, Martin on Civil Procedure at Common Law is cited, and also the Statute of Anne. In Martin, *supra*, Sec. 317, the rule of the common law is stated as follows:

> "But by the common law the defendant was prohibited from giving distinct answers to the same claim or cause of action. He was compelled to rely upon one alone, and in making his selection he sometimes incurred the risk of founding his defense upon the weaker plea."

The further reading of the section just quoted from shows that the rule stated was modified by the Statute of Anne, which statute is relied upon by plaintiff in error. The Statute of Anne, however, was enacted in the year 1705, while the common law of the State of Missouri included only such statutes of parliament as were enacted prior to the fourth year of James the First. Section 4151, Revised Statutes of Missouri, 1899, is as follows:

> "The common law of England, and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the

> Constitution of the United States, the Constitution of this State, or the statute laws in force for the time being, shall be the rule of action and decision in this State, any law, custom or usage to the contrary notwithstanding."

It appears, therefore, that the rules of practice under the common law, as existing in the State of Missouri are in no manner affected by the Statute of Anne, and that two defenses to the same claim or cause of action are not authorized under such procedure.

That wilful nonuser of franchises, as well as misuser, is a sufficient basis for a judgment of ouster of a corporation from its corporate franchises, is abundantly sustained by the authorities. In High's Extraordinary Legal Remedies, Sec. 745, it is said:

> "And in said case of judgment for the king for a usurpation of the franchise, or for its misuse, or nonuser, a judgment of seizure into the king's hands was rendered, if the franchise was of such a nature as to subsist in the hands of the crown; if not of such a nature, there was merely judgment of ouster for the purpose of dispossessing the party. In case of judgment for a seizure of the franchise into the king's hands, *all franchises incident and subordinate thereto, and held by the same grant, were also forfeited.*"

This doctrine is so clearly stated in the opinion of the Supreme Court of Missouri in this cause, that it is useless to attempt to add to what is there said. That part of the opinion dealing with this question, is as follows:

> "2. Courts move cautiously in taking from corporations their charter grant of franchises. No insignificant act of either misuser or nonuser

will suffice for the exercise of the power vested in the courts, but the courts can and will forfeit all the franchises of a corporation for either misuser or nonuser if the acts or omissions are sufficiently great. In fact, it may be said that forfeiture may be declared upon either of three grounds: (1) Willful nonfeasance or nonuser; (2) willful misfeasance or misuser; (3) usurpation of powers not granted. 10 Cyc. p. 1280. Justice Story of the United States Supreme Court, at an early day announced the doctrine thus: "A private corporation created by the Legislature may lose its franchises by a misuser or nonuser of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation." Terrett et al. vs. Taylor et al., 9 Cranch (U. S.) loc. cit. 51, 3 L. Ed. 650. Lewis, C. J., Supreme Court of Pennsylvania, in case of Commonwealth vs. Bank, 28 Pa., loc. cit. 389, uses this language: "It may be affirmed as a general principle that where there has been a misuser or a nonuser in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and willful, they constitute a good ground of forfeiture." The Supreme Court of Mississippi says: "The acts of misuser or nonuser must be touching matters which are of the essence of the contract between the sovereign and the corporation, and they must be willful and repeated." Atty.-Genl. vs. Ry. Co., 51 Miss., loc.

cit. 608. In Iowa the doctrine is thus stated: "A failure to substantially comply with the express provisions or conditions of the articles and of the general laws, or a willful misuse or nonuse in regard to matters which go to the essence of the contract between the corporation and the state, are acts and omissions which amount to forfeiture. Ang. & A. Corp. Sec. 774; Boone, Corp. Sec. 203; Mor. Priv. Corp. 1014; Tayl. Corp. Sec. 457; Wat. Corp., Sec. 427; Ins. Co. vs. Needles, 113 U. S. 547, 5 Sup. Ct. 681, 28 L. Ed. 1084; State vs. Minnesota Central Ry. Co., 36 Minn. 246, 30 N. W. 816; State vs. Council Bluffs & N. Ferry Co., 11 Neb. 354, 9 N. W. 563; State vs. Farmers' College, 32 Ohio St. 487. Courts act with extreme caution in proceedings like this, and forfeitures will not be declared except under the express provisions of the charter, or for a plain misuse or nonuse of powers by which the corporation fails to fulfill the design and purpose of its organization. State vs. Farmers' College, *supra;* State vs. Commercial Bank, 10 Ohio, 535; Harris vs. Ry. Co., 51 Miss. 602; Ry. Co. vs. People, 73 Ill. 541; State vs. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; State vs. Societe Republicaine, 9 Mo. App. 114. It is only such acts or omissions as concern matters which are of the essence of the contract between the State and the corporation, or, in other words, in which the public has an interest, that are causes of forfeiture. Commercial Bank vs. State, 6 Smedes & M. (Miss.) 599; Attorney-General vs. Petersburg & R. Ry. Co., 28 N. C. 456; Harris vs. Ry. Co., 51 Miss. 602; State vs. Council Bluffs & N. Ferry Co., *supra;* Thompson

vs. People, 23 Wend. (N. Y.) 537; State vs. Real Estate Bank, *supra;* State vs. Minnesota Central Ry. Co., *supra.*" In addition to the cases quoted from, and the cases cited in the quotations, many others along the same line could be cited. Suffice it to say that the courts hold, and rightfully, that where there is either willful misuse or willful nonuse of the franchise or franchises which are of the essence of the contract with the State, and those in which the State or public is most interested, then a forfeiture of the whole charter should be and will be declared. When a corporation receives from the State a charter granting certain franchises or rights, there is at least an implied or tacit agreement that it will use the franchises thus granted; that it will use no others, and that it will not misuse those granted. A failure in any substantial particular entitles the State to come in and claim her own—the rights theretofore granted—and this through a judgment of forfeiture in a proceeding like the one at bar. The right to construct and maintain suitable fair grounds in the city and county of St. Louis, and to give exhibitions of agricultural products thereat, is one of the essence of this contract between the State and the respondent. It was and is the franchise, in the exercise of which the State and general public have the most interest and concern. A failure to exercise this franchise was a failure to perform the very thing which was of the essence of the contract. That this failure was willful is shown by the length of time of the admitted nonuser, as well as by other things made apparent by the pleadings. So far as the State and general pub-

> lic are concerned, this right of franchise, so long neglected, was leading and uppermost in interest. No legal excuse is offered for respondent's failure. It would appear, at least by inferences deducible from the pleadings, that respondent was alert in promoting that incidental feature of its charter, gambling upon horse races, and furnishing its gamblers with refreshments, both liquid and solid, but extremely indifferent as to doing the thing, moral in character, which it had, by receiving its charter, tacitly agreed to do, and the only things in which the State and public had any special interest. Such a flagrant and willful nonuser of franchises, which are of the very essence of the grant, demand, in our judgment, the forfeiture of all the rights and franchises granted, and we therefore hold that there shall be a judgment decreeing a forfeiture of all the rights and franchises granted to respondent by its charter and a dissolution of said corporation."

As stated in the foregoing excerpt of the opinion in this cause, the franchises conferred upon plaintiff in error, in which the public were vitally interested, not the incidental or permissive franchises, but the first and principal grants from the State, the maintaining of suitable fair grounds, the giving of agricultural exhibitions and horse races for the improvement of stock, remained unused and unexercised for more than four years, and until the filing of the information in this cause. That it did carry on horse races was no excuse for its failure to exercise the high and laudable purposes set forth in its charter.

Under the issues made by the pleadings and the set-

tled law applicable thereto, plaintiff in error was clearly guilty of wilful nonuser of its principal franchises and the judgment of ouster was rightfully rendered against it.

Respectfully submitted,
HERBERT S. HADLEY, Att'y-General,
JOHN KENNISH, Asst. Att'y-General,
Attorneys for Defendant in Error.

Office Supreme Court, U. S.
FILED.
APR 29 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 219.

DELMAR JOCKEY CLUB, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

STATE OF MISSOURI, ON THE RELATION OF THE ATTORNEY-GENERAL, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Missouri.

Reply Brief for Defendant in Error.

HERBERT S. HADLEY, Att'y-General,
JOHN KENNISH, Asst. Att'y-General,
Attorneys for Defendant in Error.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 219.

DELMAR JOCKEY CLUB, A CORPORATION,
PLAINTIFF IN ERROR,

vs.

STATE OF MISSOURI, ON THE RELATION OF THE ATTORNEY-GENERAL, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Missouri.

Reply Brief for Defendant in Error.

I.

PLAINTIFF IN ERROR'S REPLY BRIEF.

Defendant in error has insisted from the first, and still insists, that the first motion for a re-hearing, filed by plaintiff in error and which was sustained by the court without opinion, the judgment set aside and the cause re-submitted on the issues made by the motion for judgment on the pleadings, can not now be looked to to sustain Federal jurisdiction; that the motion, having been sustained by the court, and plaintiff in error having secured all it asked for—a re-hearing of the issues—had served its purpose and could no more be considered a factor in the subsequent proceedings than the demurrer, the motion to modify the judgment, or the motion to strike from the files the motion for judgment on the

pleadings. The contention of defendant in error has been that when the case was re-argued and re-submitted on re-hearing and a different judgment rendered than in the first instance, after which a second motion for a re-hearing was filed praying the court to set aside the second judgment, which second motion the record (page 46) shows was considered and overruled without opinion; that, therefore, said second motion alone can be looked to to determine the issue as to the existence of a Federal question.

But for the sake of argument only (and so expressly stated) defendant in error in a former brief argued that conceding plaintiff in errors' contention, viz, that he could skip his second motion leveled against the judgment of which he now complains, and go back to the first motion leveled against a judgment which was set aside, that even in that case the record was barren of a Federal question. In support of this proposition defendant in error called attention to the fact that only the first and third grounds of the first motion for rehearing referred to the ground of nonuser as a basis for the judgment then complained of, and that as the second judgment was based upon nonuser alone, in any event only the grounds of the motion for re-hearing referring to nonuser of franchisers as a basis for the judgment, could now be considered. It was also argued by the defendant in error, that as the Federal question sought to be raised by the first ground of said motion was under the Eighth Amendment to the Federal Constitution only, and that as under the well settled law the first ten amendments to the Federal Constitution were not limitations upon the power of the States but upon the Federal Government, that the attempt to raise a Federal question under Eighth Amendment must fail; and as the Federal question sought to be raised by the third ground of the first motion for re-hearing, was that

the judgment of the court amounted to a denial of due process of law to plaintiff in error under the Fourteenth Amendment to the Federal Constitution, and that as plaintiff in error had in fact been accorded a trial of the issues, even two trials, its case fell within the well-recognized doctrine that—

> "Parties having been fully heard in the regular course of judicial proceedings, an erroneous decision of the State court does not deprive the unsuccessful party of its property without due process of law." See authorities cited in defendant in error's brief, Point III, page 9.

Plaintiff in error has filed a reply brief herein in which it is stated that defendant in error is incorrect in the statement made in its brief relative to the first motion for re-hearing, and that a Federal question was also raised in the fifth ground of said first motion. We have carefully re-examined said fifth ground and, keeping in mind the fact that the first judgment (to which said motion was addressed) was based upon both misuser and nonuser of franchises, it is submitted that the defendant in error was not mistaken upon this point. But be that as it may, the case is not in the least altered for the reason that the Federal question sought to be raised in the fifth ground, whether referring to misuser or nonuser, is that the plaintiff in error was denied due process of law, identically the same question presented in the third ground and therefore open to the same sufficient answer as made by the defendant in error in that case.

II.

In its reply brief, plaintiff in error claims that it was denied due process of law in that by the judgment of the court it was deprived of its charter without a trial. It is of course inaccurate and disproved by the record to say that the judgment was rendered against plaintiff

in error without a trial. The theory upon which the above complaint is based is that its second defense was intended as an estoppel and not in effect a confession and attempted avoidance, as held by the State court. The second defense is not a pleading of estoppel, was not so intended, nor was it so claimed in the early stages of the case. In the motion to strike from the files the motion for judgment on the pleadings (printed Rec., p. 28), plaintiff in error said:

> "Because the record expressly shows that respondent's answer made the further defense, that the State of Missouri waived the giving of local fairs by respondent between the 18th day of January, 1901, and the 16th day of June, 1905, and that during said period respondent in all respects lawfully exercised and used the franchises granted to it by the State of Missouri in the manner authorized by law.
>
> "Because the record expressly shows that the language used in said answer in its concluding paragraph merely averred that no duty was imposed upon respondent to exercise the particular franchise of holding fairs and making agricultural exhibitions, between the dates of June 16th, 1905, and July 28, 1905, *which two defenses, traverse and waiver, fully meet all the allegations of the information and preclude any judgment before taking and submitting proofs.*"

It will be noted that in the above motion, plaintiff in error not only did not claim the second defense as an estoppel, but that it did not contend that either defense met all the allegations of the information as it has since and now contends. It then said: "Which two defenses, traverse and waiver fully meet all the allegations of the information" etc.

The State court held that the charges of nonuser were not met and the most that can be said of its action is that it was erroneous, which is not alone sufficient to raise a Federal question.

III.

Another point in the reply brief of plaintiff in error, page 3, to which we desire to call attention, is the following:

> "And Federal questions raised in a motion for re-hearing are not raised too late if the court sustains said motion, as was done in this case."

The cases of Mallett *vs.* North Carolina, 181 U. S., 589, and Mutual Life Ins. Co. *vs.* McGrew, 188 U. S., 291, are cited as supporting this statement of the law. And in plaintiff in error's brief on the motion to dismiss for want of a Federal question (page 23), the same cases are cited, and it is there stated referring to the Mallett case supra, that "the above case can not be distinguished from the case at bar." A consideration of said cases will disclose not only that they do not support the contention of plaintiff in error but are authority to the contrary. In the Mallett case it appears from the facts stated that Mallett was convicted of a crime in the criminal court of Edgecombe County, North Carolina; that he appealed from judgment to the Superior Court of that State; that the latter court reversed the judgment of the trial court and awarded the defendant a new trial; that the State then appealed from the judgment of the Superior Court to the Supreme Court of that State and that the latter court reversed the judgment of the Superior Court and directed the judgment of the trial court to be enforced and carried out. When the crime was committed and the trial had in the criminal court, the State was not entitled to an appeal from the judgment of the Superior Court to the Supreme Court, but before the case was disposed of in the Superior Court an act of the legislature of that State went into effect allowing such appeal. After the Supreme Court had reversed the judgment as above, Mallett filed

a motion for a re-hearing therein raising Federal questions as to the right of the State so to appeal. Before the filing of the motion for a re-hearing the court had rendered an opinion which had not been certified down and in which no Federal question was passed upon, but a second opinion was filed after consideration of the motion for re-hearing in which Federal questions were considered, and passed upon adversely to Mallett's contention.

In discussing the question as to the existence of a Federal question in the record this court, on page 592, said:

> "But those were cases in which the Supreme Court of the State refused the petition for a re-hearing and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. State *vs.* Mallett, 125 North Carolina, 718. Had that court declined to pass upon the Federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action."

The foregoing statement of the law is cited with approval in the following cases:

> Mutual Life Insurance Co. *vs.* McGrew, 188 U. S., 291.
>
> Leigh *vs.* Green, 193 U. S., 79.
>
> Fullerton *vs.* Texas, 196 U. S., 192.
>
> McMillen *vs.* Ferrum Mining Co., 197 U. S., 347.

Under the law as declared in the foregoing authorities in order that a motion for a re-hearing may be invoked as a basis for Federal jurisdiction, Federal questions must not only be raised therein, but must also be passed

upon by the State court, otherwise this court "certainly would not undertake to revise their action."

It will be noted that in the foregoing excerpt from the Mallett case this court said: "Had the court declined to pass upon the petition and *dismissed the petition without considering them*" etc. In the case at bar the court did not dismiss the petition (which contained grounds in which no Federal question was involved as well as other grounds containing Federal questions), and surely the doctrine that the Federal questions must have been considered by the court would apply with greater force in such case.

But why did not plaintiff in error raise Federal questions, if it was sought to rely thereon, in the second motion for re-hearing and to set aside the judgment of which it now complains in this court? Conceding that it was a proper method of raising such questions in case of the judgment which was set aside, why was not the second motion for re-hearing the proper instrument to raise such questions for re-hearing and to set aside the second judgment? Plaintiff in error attempts to answer this pertinent inquiry in its brief on the motion to dismiss, at page 27 thereof, as follows:

> "Now, after the rendition of the above judgment, plaintiff in error in November, 1906, filed a second motion for re-hearing, and this is the motion which was accorded so much consideration in the brief of defendant in error. We submit, however, that, as this second motion was neither sustained nor considered by the court, it is wholly immaterial whether it does or does not contain a Federal question. The proper time to claim constitutional rights and immunities is not after, but before, the final judgment of the State court, and this we did in the motion for re-hearing filed in June, 1906, and in which we expressly claimed constitutional rights and immunities that were necessarily denied by the final judgment of the Missouri court."

In the foregoing we are told that the proper time to claim Federal rights and immunities is after, but not before, the final judgment. But the motion upon which the plaintiff in error is now placing reliance was filed after the judgment to which it was addressed, and surely plaintiff in error did not file such motion anticipating a second adverse judgment after the setting aside of the judgment from which it then sought relief. If it was not the purpose of the second motion for a re-hearing to present to the court the questions upon which plaintiff in error was basing its rights as against the said second judgment then it is difficult to see what the purpose was for filing it at all. So far as the Federal question is concerned it is manifest that the second motion for a re-hearing is the only motion of any vitality upon that question, and it is not now contended that a Federal question is presented by such second motion.

It is submitted that no Federal question is presented by the record in this cause, that plaintiff in error has been fully heard in the State court and that when its complaint is analyzed it amounts to nothing more than that plaintiff in error takes issue with the Supreme Court of the State of Missouri as to a matter of purely State practice and procedure.

Respectfully submitted.

HERBERT S. HADLEY, Att'y-General,
JOHN KENNISH, Asst. Att'y-General,
Attorneys for Defendant in Error.